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No. 06-___ 06-241

IN THE

Supreme Court of the United States

ROYA RAHMANI, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *McKinney v. Alabama*, 424 U.S. 669 (1976), the Government may prosecute an individual for donating money to or soliciting donations for an organization designated as a "foreign terrorist organization" while prohibiting the defendant from demonstrating that the organization was improperly designated a "foreign terrorist organization" under the governing statute and that the donation or solicitation was therefore protected by the First Amendment.

2. Whether, under *Freedman v. Maryland*, 380 U.S. 51 (1965), and the governing statutory scheme, the Government may prosecute an individual for donating money to or soliciting donations for an organization designated as a "foreign terrorist organization" where the statutory provisions for challenging a designation lack the minimum procedural safeguards that this Court has consistently held are required to assure the reliability of Governmental decisions that determine that speech activity is unprotected by the First Amendment.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Hossein Afshari, Mustafa Ahmady, Mohammad Omidvar, Alireza Mohamadmoradi, Roya Rahmani, Hassan Rezaie and Navid Taj. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-35a) is reported at 426 F.3d 1150.[1] The dissent from the denial of

[1] The court of appeals first issued a published opinion on December 20, 2004, reported at 392 F.3d 1031. Petitioners filed a petition for rehearing and rehearing en banc. On June 17, 2005, the court of appeals withdrew the December 20, 2004 opinion and contemporaneously filed a new published opinion, reported at 412 F.3d 1071. Petitioners again filed a petition for rehearing and rehearing en banc. On October 20, 2005, the court of appeals withdrew the June 17, 2005 opinion and contemporaneously filed its final opinion in this matter.

Petitioners' request for rehearing and rehearing en banc (Pet. App. 1a-14a) is reported at 446 F.3d 915. The opinion of the district court (Pet. App. 36a-59a) is reported at 209 F. Supp. 2d 1045.

JURISDICTION

. The order denying Petitioners' request for rehearing and rehearing en banc was entered on April 17, 2006. Justice Kennedy extended the time to file this petition to and including August 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech." The relevant statutory provisions, 18 U.S.C. § 2339B (2000), 8 U.S.C. § 1189 (2000), and 8 U.S.C. § 1182(a)(3)(B) (2000), are set forth separately in the petition appendix (Pet. App. 60a-73a). The version of each statute included in the appendix is that which was in effect on March 13, 2001, when Petitioners were indicted.

STATEMENT

Petitioners, United States citizens and political asylees from Iran, were charged in March 2001 with violating 18 U.S.C. § 2339B by providing material support to an Iranian dissident organization that is included on the Secretary of State's list of foreign terrorist organizations. Under the Ninth Circuit's decision in this case, Petitioners are precluded from demonstrating, in any forum, that the organization that they are charged with supporting does not meet the statutory definition of a foreign terrorist organization, and that any donations to or solicitations for that group are protected by the First Amendment. The court of appeals' decision thus eviscerates the rights—long protected under the First Amendment—to

solicit donations for and to contribute money to political groups that are *not* terrorist.

Judge Kozinski, dissenting from the Ninth Circuit's denial of en banc review, demonstrated that the court of appeals' decision "contravenes *McKinney v. Alabama*," 424 U.S. 669 (1976), which holds that a criminal defendant has a constitutional right to show that his conduct is protected by the First Amendment. Pet. App. 11a. The Ninth Circuit decision also violates the rule of *Freedman v. Maryland*, 380 U.S. 51 (1965), that the Government may only designate conduct as unprotected by the First Amendment after providing rigorous due process safeguards to ensure the accuracy of its designation. "[T]he panel has simply overruled *Freedman*—without so much as mentioning it." Pet. App. 11a (Kozinski, J., dissenting).

1. The jurisdiction of the district court was invoked under 18 U.S.C. § 2339B, which makes it a federal crime to provide "material support or resources" to a group designated by the Secretary of State as a "foreign terrorist organization." When Petitioners were indicted, that crime was punishable by up to 10 years in prison. 18 U.S.C. § 2339B(a)(1) (2000), Pet. App. 60a. After September 11, 2001, the maximum penalty was increased to 15 years' imprisonment. *See* 18 U.S.C. § 2339B(a)(1) (Supp. 2006) *as amended by* USA PATRIOT Act of 2001, Pub. L. 107-56 § 810(d), 115 Stat. 380 (2001).

The Secretary of State is authorized to designate a foreign group as a terrorist organization if the Secretary concludes that the group engages in "terrorist activity" that is a threat to the "national security of the United States." 8 U.S.C. § 1189(a)(1) (2000), Pet. App. 66a. For purposes of this statute, the term "terrorist activity" is defined broadly and includes, for example, any threat to use an explosive or firearm to damage property, anywhere in the world, unless for

personal monetary gain.[2] Likewise, the statute broadly defines "national security" to include "the national defense, foreign relations, or *economic interests* of the United States." 8 U.S.C. § 1189(c)(2) (2000), Pet. App. 70a (emphasis added). The statute places no restriction on the type of information the Secretary can use in designating an organization as a "foreign terrorist organization."

The statute does not require the Secretary to notify an organization or any of its members before designating it a "foreign terrorist organization," and the designation becomes effective upon publication in the Federal Register without any requirement of actual notice. 8 U.S.C. § 1189(a)(2)(B)(1) (2000), Pet. App. 67a. Under the version of the statute in effect when Petitioners were indicted in early 2001, the designation lasted for two years and was renewable by the Secretary. 8 U.S.C. § 1189(a)(4) (2000), Pet. App. 67a-68a. The designated organization alone may seek review in the D.C. Circuit within 30 days after the Federal Register publication. 8 U.S.C. § 1189(b)(1), Pet. App. 69a. Such review is limited to the administrative record, and "the Government may submit, for ex parte and in camera review, classified information used in making the designation." 8 U.S.C. § 1189(b)(2) (2000), Pet. App. 69a. Because the administrative record is prepared without notice to the organization, the record includes only information submitted by the Government.[3]

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[2] *See* 8 U.S.C. § 1189(a)(1)(B) (2000), Pet. App. 66a (terrorist activity is defined by 8 U.S.C. § 1182(a)(3)(B)); 8 U.S.C. §§ 1182(a)(3)(B)(ii)(V) and (VI) (2000), Pet. App. 72a (terrorist activity includes a "threat" to use "any explosive or firearm (other than for mere personal monetary gain) . . . with intent to . . . cause substantial damage to property"). In 2001, after Petitioners were indicted, Congress further expanded the definition to include "terrorism" as defined in 22 U.S.C. § 2656f(d)(2). *See* 8 U.S.C. § 1189(a)(1)(B) (2005), *as amended by* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411(c), 115 Stat. 349 (2001).

[3] In 2001, after the indictment in this case was filed, the D.C. Circuit required that certain changes be made to the procedure for designating

The D.C. Circuit is required to "hold unlawful and set aside" any designation it finds to be "contrary to constitutional right." 8 U.S.C. § 1189(b)(3) (2000), Pet. App. 69a. However, if the organization does not have sufficient "presence" to warrant constitutional protections, the D.C. Circuit is precluded from considering whether the designation is unconstitutional. *People's Mojahedin Org. of Iran v. Dep't of State*, ("*PMOI I*"), 182 F.3d 17, 22 (D.C. Cir. 1999). That is, while an organization without constitutional presence can attempt to prove that the Secretary of State abused her discretion in designating it as a "foreign terrorist organization," such a group has no right to challenge the *constitutionality* of the designation.

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organizations that have sufficient presence in the United States to warrant constitutional protections. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-209 (D.C. Cir. 2001) ("*PMOI II*"). Specifically, before designating a group that has such a presence, the Secretary of State must provide the organization with notice and "the opportunity to present, at least in written form" rebuttal material. *Id.* Those procedures are not available to groups that do not have sufficient presence in the United States to warrant constitutional protection.

Congress subsequently amended the statute to provide that "terrorist" designations remain in effect in perpetuity, and to allow a designated organization to bring a court challenge when first designated and also to petition to revoke the designation two years after it has been in effect. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7119(a), 11 Stat. 3801 (2004) (codified at 8 U.S.C. § 1189(a)(4) (2005)). Those procedures are available to all organizations, whether or not they have a constitutional presence in the United States. However, only an organization with a constitutionally sufficient presence in the United States will be able to submit evidence into the administrative record in its appeal of the original designation, or make a constitutional challenge to the designation at any time. *PMOI II*, 251 F.3d at 203.

Neither the D.C. Circuit's decision nor the statutory amendment, will have any effect on Petitioners (whose indictment predated implementation of those changes), or on the vast majority of organizations that have no constitutional presence in the United States. Nor do they affect the constitutional arguments we make in this cert petition. *See infra* at 21-28.

Defendants in criminal actions brought under 18 U.S.C. § 2339B, such as Petitioners, are specifically precluded from raising "any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing." 8 U.S.C. § 1189(a)(8) (2000), Pet. App. 68a-69a.[4] Thus, a defendant may be convicted of a felony under § 2339B even if the organization never brought a timely challenge to the designation in the D.C. Circuit, and even if no court has ever ruled on the propriety or constitutionality of the Secretary of State's designation.

2. On March 13, 2001, Petitioners were indicted in the Central District of California for allegedly providing financial support to the Mujahedin-e Khalq ("MEK"), an Iranian opposition group commonly known as the People's Mojahedin Organization of Iran ("PMOI"). The indictment alleges that the Petitioners engaged in such activities as soliciting donations for the PMOI at Los Angeles International Airport.

The PMOI is the main political opposition group in Iran, and seeks a transition to a secular democratic government. It publishes periodicals, has lobbied Congress, and has aided the United States' investigation into terrorist bombings and into Iran's nuclear program. *See* www.ncr-iran.org.

During the period when Petitioners allegedly donated to the group, more than two hundred members of the United States Congress called the PMOI a legitimate opposition to the Iranian regime and urged its removal from the terrorist list. Pet. App. 44a-45a nn.6-8. News reports at the time of the designation in 1997 indicate that the State Department listed

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[4] The Government may also bring a civil action pursuant to 18 U.S.C. § 2339B(c) to enjoin an individual from giving a donation to a designated "foreign terrorist organization." Such action can be brought in any district court, and there is nothing to prohibit *civil* defendants from defending themselves by demonstrating that the organization does not fit the criteria for a foreign terrorist organization.

the organization as a "foreign terrorist organization" only as a "goodwill gesture" to Iran's then-newly elected President Mohammad Khatami. Norman Kempster, *U.S. Designates 30 Groups as Terrorists*, L.A. Times, Oct. 9, 1997. In 2004, after a 16-month review of the PMOI in Iraq, the United States Government "found no basis" to prosecute PMOI members for violations of United States law, and instead afforded them "protected status" and prohibited their extradition to Iran, which calls into question the group's "terrorist" designation. Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian Opposition "Terror" Group Being Held in Iraq*, N.Y. Times, Jul. 27, 2004, at A1.

Nonetheless, under the statutory scheme, it is entirely irrelevant to the charges against Petitioners whether the PMOI is in fact a legitimate political opposition or a terrorist organization. Under 18 U.S.C. § 2339B, supporting the PMOI is illegal as long as the group is on the Secretary's list of "foreign terrorist organizations."

Nor is it relevant whether Petitioners had any intent that funds would be used to support terrorist activities, or whether any of the allegedly donated funds actually were used for that purpose. Contributing to an organization with the *intent* or *knowledge* that the money will support terrorism is punishable under other statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339C. The statute under which Petitioners were indicted, 18 U.S.C. § 2339B, does not contain any intent requirement. Thus, the allegation in the indictment is merely that the PMOI was listed as a "foreign terrorist organization" between 1997 and 2001, when Petitioners allegedly donated money to the group.

3. The Secretary of State first designated the PMOI as a foreign terrorist organization in 1997. In accordance with the statute, the PMOI sought judicial review of that decision in the D.C. Circuit. *PMOI I*, 182 F.3d 17.

The D.C. Circuit concluded that the PMOI had no constitutional "presence" in the United States and therefore "has no constitutional rights, under the due process clause or otherwise," that could have been violated by the designation. *Id.* at 22. The court thus examined only whether there was substantial evidence supporting the Secretary of State's designation, and upheld the designation without ever deciding its constitutionality. *Id.* at 24-25. Nonetheless, it did so only after noting the considerable limitations on its scope of review:

> For all we know, the designation may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from saying. That we cannot pronounce on the question does not mean that we must assume that the Secretary was right. It means we cannot make any assumption, one way or another.

Id. at 23.

4. The Secretary of State redesignated the PMOI as a terrorist group in 1999, and the PMOI again sought review in the D.C. Circuit. *PMOI II*, 251 F.3d 192. The statutory procedures for designating foreign terrorist organizations were not changed between 1997 and 1999. The Secretary's 1999 designation of the PMOI, however, included the designation of the National Council of Resistance of Iran ("NCRI") as a PMOI "alias." *Id.* at 197. The D.C. Circuit concluded that the NCRI had a constitutional presence in the United States and therefore held that the PMOI/NCRI could challenge the constitutionality of the 1999 designation. *Id.* at 202.

The D.C. Circuit examined the statutory procedures for designating "foreign terrorist organizations" that it had addressed in *PMOI I*, and held that they violate "'the fundamental requirement of due process,' that is, 'the opportunity

to be heard at a meaningful time and in a meaningful manner.'" *Id.* at 208 (citation omitted). The court stated:

> The unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point in the proceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record. Nothing in the statute forbids the use of 'third hand accounts, press stories, material on the internet or other hearsay regarding the organization's activities.' [citation]. The Secretary may base the findings on classified material, to which the organization has no access at any point during or after the proceeding to designate it as terrorist.

Id. at 196 (quoting *PMOI I*, 182 F.3d at 19). Moreover, judicial review in the D.C. Circuit "is not sufficient to supply the otherwise absent due process protection" because the court is limited to a review of an administrative record "compiled by the Secretary without notice or opportunity for any meaningful hearing." *Id.* at 209.

Although the statute requires that the D.C. Circuit "hold unlawful and set aside a designation the Court finds to be . . . contrary to constitutional right, power, privilege, or immunity" (8 U.S.C. § 1189(b)(3)), the D.C. Circuit left in place the designation of the PMOI as a foreign terrorist organization pending remand to the Secretary of State. *PMOI II*, 251 F.3d at 209.

On remand, the Secretary of State provided the PMOI with the non-classified information upon which the designation was based, and gave the PMOI an opportunity to file written responses to the non-classified information. Then, in late 2001, it retroactively reaffirmed the 1999 designation. *See People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003) ("*PMOI III*"). The PMOI again appealed, and the D.C. Circuit upheld the retroactive 1999 designation. *Id.* at 1245.

Because the indictment charges that Petitioners supported the PMOI between 1997 and 2001, only the 1997 and 1999 designations of the PMOI—both of which used procedures that the D.C. Circuit found in *PMOI II* to be unconstitutional—form the basis for the indictment.

5. Petitioners moved to dismiss the indictment, and on July 22, 2002, the district court dismissed the indictment on the grounds that the designation of the PMOI as a foreign terrorist organization was unconstitutional and, "having been obtained in violation of the Constitution, is a nullity and cannot serve as a predicate in a prosecution for violation of Section 2339B." Pet. App. 59a.

The Government appealed, and the Ninth Circuit reversed the district court's dismissal of the indictment, noting that "[u]nder [18 U.S.C.] § 2339B, if defendants provide material support for an organization that has been designated as a terrorist organization under [8 U.S.C.] § 1189, they commit the crime, *and it does not matter whether the designation is correct or not.*" Pet. App. 22a (emphasis added).[5]

The court of appeals rejected Petitioners' contention that this case is governed by *McKinney v. Alabama.* In *McKinney,* this Court held that a criminal defendant charged with selling materials previously judicially designated as obscene had a First Amendment right to defend himself by showing that the materials were not obscene, and that the sale was therefore First Amendment-protected. *McKinney v. Alabama*, 424 U.S. 669, 674 (1976). Petitioners likewise contend that they have the right to defend themselves by demonstrating that the PMOI does not meet the statutory criteria for a foreign terrorist organization, and that donating to the organization is

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[5] As noted in footnote 1, *supra*, the Ninth Circuit panel actually issued three successive published opinions in this case, each time withdrawing its previous decision. We refer here to the panel's final opinion, 426 F.3d 1150, Pet. App. 15a-35a.

therefore protected by the First Amendment. The court of appeals held that *McKinney* does not apply since the PMOI *is* a foreign terrorist organization, and therefore donations to the PMOI are not First Amendment-protected. Pet. App. 30a, 31a. The court never addressed the *McKinney* point that if the group does not meet the statutory criteria, it is *not* a terrorist organization, and any donation to that group is therefore constitutionally protected.[6]

Petitioners sought rehearing and rehearing en banc. The order denying the petition for rehearing en banc was accompanied by a dissent authored by Judge Kozinski and joined by four other judges. Judge Kozinski's dissent demonstrated that the panel's opinion contravenes both *McKinney v. Alabama* and *Freedman v. Maryland*, and that the "terrorist organization designation scheme 'fails to provide adequate safeguards against undue inhibition of protected expression.'" Pet. App. 9a (quoting *Freedman v. Maryland*, 380 U.S. 51, 60 (1965)). Judge Kozinski concluded that the court of appeals' decision not only conflicts with the decisions of this Court, it "runs contrary to two of our defining traditions—that of free and open expression, and that of justice and fair play." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's published decision in this case presents a square conflict with longstanding Supreme Court precedent and involves a matter of great national concern: the Government's ability to prosecute individuals for engaging in speech activity while simultaneously precluding them from demonstrating that their activity is protected by the First Amendment.

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[6] The court of appeals also failed to address Petitioners' separate First Amendment argument that this prosecution is precluded by *Freedman v. Maryland*, which requires that if the Government makes a decision that particular expressive activity is unprotected by the First Amendment, it must provide rigorous procedural safeguards to enable individuals to challenge the reliability of its designation. *See* argument *infra* at 21-28.

18 U.S.C. § 2339B authorizes the Government to prosecute individuals for giving money to a group on the Secretary of State's list of "terrorist" organizations. Donations are criminalized even if they are intended to support purely peaceful political activities that fall within the core of the First Amendment's protections. This is based on the rationale that money is fungible, and therefore that whenever money is donated to a "foreign terrorist organization," those funds support terrorism. It is one thing, however, to presume that any financial support given to a terrorist organization subsidizes terrorist activities. *See, e.g., Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) ("*HLP*"). But if the group is *not* a terrorist organization, that presumption cannot hold, and the criminal prohibition against providing support unconstitutionally interferes with First Amendment rights.

As Judge Kozinski noted in his dissent from the denial of en banc review in this case, "[t]he determination of whether or not an organization is engaged in terrorism is therefore crucial, because it distinguishes activities that can be criminalized from those that are protected by the First Amendment." Pet. App. 2a. Thus, the key to this case is how to decide whether Petitioners' allegedly criminal activities are First Amendment-protected.

This Court answered that very question in *McKinney v. Alabama,* in which it held that a criminal defendant in Petitioners' position must be given the right to prove that his conduct is protected by the First Amendment. The Ninth Circuit's opinion in this case would allow the Government to deprive a criminal defendant of the right to prove that his conduct is protected by the First Amendment solely because the Government labels an organization "terrorist," in direct contravention of *McKinney*.

The court of appeals' decision also contravenes *Freedman v. Maryland*, which requires the Government to provide strict

procedural safeguards to allow individuals to challenge the reliability of a determination that particular expressive activity is not protected by the First Amendment. Here, two D.C. Circuit decisions confirm that the procedures by which an organization can challenge a "terrorist" designation (a designation that has the consequence of rendering donations to that group unprotected by the First Amendment) lack the minimal procedural safeguards to ensure reliability. *PMOI I*, 182 F.3d 17; *PMOI II*, 251 F.3d 192; *see also* Pet. App. 7a-11a (Kozinski, J., dissenting).

The court of appeals' decision reinstating the indictment in this case has sweeping implications far beyond the statute at issue. It allows the Government to criminalize activities that would otherwise be First Amendment-protected merely by labeling those activities as contrary to American economic, foreign relations or defense interests, and to preclude a constitutionally adequate review of its determination.[7]

I. THE NINTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *MCKINNEY V. ALABAMA*

In *McKinney v. Alabama,* this Court overturned a criminal conviction obtained under a statutory scheme structurally indistinguishable from 18 U.S.C. § 2339B. The Alabama statute made it a crime to sell materials that had been "judicially declared" to be obscene in a proceeding to which the defendant was not a party. *McKinney v. Alabama*, 424 U.S. 669, 670 (1976). The defendant was precluded from challenging the underlying judicial determination of obscen-

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[7] In enacting this measure on the heels of the Oklahoma City bombing, the Senate was well aware of the First Amendment problems caused by 18 U.S.C. § 2339B. Senator Arlen Specter specifically noted that: "I am also concerned about the first amendment implications of this provision, restricting the ability of U.S. citizens to support favored causes." 142 Cong. Rec. S3454, 3473 (daily ed. Apr. 17, 1996).

ity or arguing that the material was not obscene. The only question was whether the defendant sold materials that had been *designated* as unprotected by the First Amendment. *Id.* at 673.

The Court, in a unanimous opinion authored by Justice Rehnquist, rejected the government's assertion that a prior determination of obscenity could "finally bind" defendants who had neither notice of the hearing nor an opportunity to be heard. *Id.* at 674. It held that "[s]uch a procedure, without any provision for subsequent re-examination of the determination of the censor, would clearly be constitutionally infirm." *Id.* The results of the prior proceeding could not "conclusively determine the First Amendment rights of others." *Id.* at 676; *see also Soundgarden v. Eikenberry*, 871 P.2d 1050 (Wash. 1994) (following *McKinney* and invalidating statute that made it a crime to sell materials previously judicially declared to be "erotic material"); *State v. Luck,* 353 So.2d 225, 229 (La. 1977) (judicial determination of obscenity may not serve as conclusive finding of obscenity in any other criminal case).

There is no principled constitutional distinction between selling allegedly obscene materials and donating to allegedly terrorist organizations. As the *McKinney* Court recognized, obscene materials are "beyond the protection of the First Amendment" (*McKinney*, 424 U.S. at 673), but non-obscene materials are protected by the First Amendment. Similarly, while donations to terrorist organizations may be unprotected by the First Amendment, donations to non-terrorist political groups certainly are protected.[8] And just as the Alabama statute in *McKinney* imposed strict criminal liability for sell-

[8] A terrorist designation is no less susceptible of judicial resolution than an obscenity determination. The criteria is set forth specifically by Congress. 8 U.S.C. § 1189(a)(1) (2000). The definition of obscenity, on the other hand, is far less precise. *See Miller v. California,* 413 U.S. 15 (1973).

ing material "known by [the defendant] to have been judicially found to be obscene" in a prior judicial proceeding (424 U.S. at 672 n.2), so too does 18 U.S.C. § 2339B impose strict criminal liability for contributing to groups determined to be terrorist in a prior administrative proceeding.

The key to a statute such as § 2339B, which does not require intent to support terrorist activity, is that such strict liability is predicated on the group meeting the statutory criteria for a foreign terrorist organization. *McKinney* requires that a defendant charged under such a statute have the ability to demonstrate that the organization does not meet these statutory criteria, and that any financial contribution or solicitation is therefore protected by the First Amendment.

A. The court of appeals rejected Petitioners' *McKinney* argument on the grounds that there is no First Amendment right to provide contributions for a terrorist organization. *See* Pet. App. 31a. But the same is true with obscenity—there is no First Amendment right to distribute obscene materials. The Ninth Circuit's rationale is thus entirely circular. The point of *McKinney* is that a defendant has a First Amendment right to show that the material is *not* obscene, or, in this case, that the organization is *not* a "foreign terrorist organization" under the statutory designation criteria. That is because "if the organization is *not* a designated terrorist organization, then monetary contributions to it *are* protected by the First Amendment." Pet. App. 6a (Kozinski, J., dissenting).

This Court's decisions spanning more than 30 years consistently hold that donating money to support the nonviolent political, philosophical or ideological goals of a group is expressive and associational activity that is fully protected by the First Amendment. *Randall v. Sorrell*, 126 S.Ct. 2479, 2491 (2006) (Breyer, J., plurality opinion) (limits on contributions "'implicate fundamental First Amendment interests' namely, the freedoms of 'political expression' and 'political association.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 15, 23

(1976)); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 134-135 (2003); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) (right to make donations to an organization promoting a political cause involves an "overlap and blend" of the First Amendment rights of association and expression); *Buckley*, 424 U.S. at 65-66 (freedom of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'"). Thus, if, as Petitioners contend, the PMOI were *not* properly designated as a terrorist organization, any donation to that group would be First Amendment-protected and could not be the basis for criminal prosecution.[9]

The court of appeals refused to follow this Court's cases holding that donations to political groups are First Amendment-protected, and relied instead on *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000) ("*HLP*"), a Ninth Circuit decision authored by Judge Kozinski holding that monetary contributions to terrorist organizations are not First Amendment-protected. But as Judge Kozinski himself demonstrated in dissent from the denial of rehearing in this case, the panel misunderstood the basis for *HLP*, and as a result its analysis in this case was fundamentally flawed.

Judge Kozinski's *HLP* opinion rejected the contention that the First Amendment requires the Government to demonstrate a defendant's *intent* to fund the terrorist activities of a terror-

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[9] Just as giving a donation is First Amendment-protected, soliciting funds also is protected by the First Amendment because it involves "a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992). The court of appeals failed to acknowledge this separate First Amendment issue.

ist organization in a § 2339B prosecution, holding that there is no First Amendment right to give to terrorist organizations, regardless of the donor's intent. *HLP*, 205 F.3d at 1134-35. That holding, however, was premised on the assumption—unchallenged in *HLP*—that the group actually met the criteria for a terrorist organization. As the *HLP* decision explained, because of the fungible nature of money, it should not matter whether a defendant who donated to a terrorist organization actually intended to fund terrorism. *HLP*, 205 F.3d at 1133-34. But as Judge Kozinski pointed out in his dissenting opinion in this case, in order for the *HLP* decision to make sense, a defendant precluded from demonstrating lack of *intent* to fund terrorist activities must be allowed to demonstrate that the group to which he or she allegedly donated does not meet the statutory criteria for a terrorist organization.

Thus, in his dissent from the denial of en banc review, Judge Kozinski wrote:

> As we explained in [*HLP*], money is fungible; if an organization engages in terrorism, it can channel money donated to it for humanitarian and advocacy purposes to promote its grisly agenda. At the same time, however, giving money to a political organization that is *not* engaged in terrorist activities is constitutionally protected. The determination of whether or not an organization is engaged in terrorism is therefore crucial, because it distinguishes activities that can be criminalized from those that are protected by the First Amendment.

Pet. App. 2a. Because defendants charged under § 2339B are precluded from demonstrating that a donation or solicitation is First Amendment-protected, "[t]he panel's opinion . . . contravenes *McKinney v. Alabama*." Pet. App. 11a (Kozinski, J., dissenting).

B. The Ninth Circuit mistakenly reasoned that, if Congress could *limit* contributions to domestic political organizations, it should be able to *prohibit* donations to foreign

terrorist organizations. Pet. App. 33a. But this again misses the point: Petitioners do not argue that it is impermissible to prohibit donations to foreign terrorist organizations, only that it is impermissible to criminalize donations to groups that do not meet the statutory criteria for a terrorist organization. While Congress may *limit* political contributions under certain circumstances, a total ban on all contributions to a non-terrorist political organization is unquestionably unconstitutional. *See, e.g., Randall,* 126 S.Ct. at 2492 (striking down contribution limits that are "too low and too strict to survive First Amendment scrutiny") (Breyer, J., plurality opinion).

Furthermore it is irrelevant, for First Amendment purposes, whether funds are donated to or solicited for a foreign group rather than a domestic organization. The Court has held that soliciting donations for international organizations is First Amendment-protected. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 644, 645, 647 (1981) (First Amendment protects soliciting donations for organization that was an "international religious society espousing the views of the Krishna religion"); *Lee*, 505 U.S. at 677 (soliciting donations for international religious group "is a form of speech under the First Amendment").[10] In any event, the

[10] Nor does the First Amendment afford any lesser protection to an individual's expressive activities that are aimed at opposing foreign governments (*Boos v. Barry*, 485 U.S. 312 (1988)) or to an individual's right to obtain information from foreign organizations (*Lamont v. Postmaster General*, 381 U.S. 301 (1965)). Indeed, the First Amendment protections here at issue are especially important where the goal is to oppose a repressive foreign regime. While anyone might stand on a soapbox in a United States park and oppose a foreign government or write letters to the editor in United States newspapers, such expression would not be remotely as effective as financial support to the main opposition group on the scene. *See Schaumberg*, 444 U.S. at 628 (rejecting contention that Government may limit solicitation so long as it allows individual to speak freely about support of a cause); *see also Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Martin v. City of Struthers*, 319 U.S. 141, 145-48 (1943).

PMOI has a presence in the United States, as well as abroad, and lobbies the United States Congress.

C. The Ninth Circuit panel also reasoned that *McKinney* is inapplicable because of "[t]he deference due the Executive branch in the area of national security." Pet. App. 33a.[11] But national security can only be a concern if the group is truly a terrorist organization. If it is *not*, this rationale falls away. As Judge Konzinski pointed out, "What possible relevance could national security have once the terrorist designation was declared unconstitutional?" Pet. App. 13a.

Moreover, a national security rationale does not give the Government *carte blanche* to prohibit criminal defendants from obtaining constitutionally required judicial review. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (O'Connor, J., plurality opinion); *see also Hamdan v. Rumsfeld*, 127 S.Ct. 2749, 2799 (2006) ("The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.") (Kennedy, J., concurring in part).

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[11] The court of appeals erroneously relied on *Regan v. Wald*, 468 U.S. 222 (1984), and *Zemel v. Rusk*, 381 U.S. 1 (1965), cases involving travel to embargoed countries. Pet. App. 33a-34a n.69. But the Court upheld those travel bans on Fifth Amendment substantive due process grounds, noting that no First Amendment rights were at issue. *Regan*, 468 U.S. at 241-42; *Zemel*, 381 U.S. at 16. The *Zemel* and *Regan* decisions, citing the First Amendment rights involved in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), recognized that the analysis would be different if First Amendment rights were at issue. *Zemel*, 381 U.S. at 16; *Regan*, 486 U.S. at 241-42.

Indeed, Congress expressly provided for judicial review of terrorist designations in both the district courts and the D.C. Circuit. The Government can initiate a civil action under 18 U.S.C. § 2339B(c) in any district court to enjoin a person from giving a donation to a designated "foreign terrorist organization." And while 8 U.S.C. § 1189(a)(8) prohibits criminal defendants from challenging the terrorist designation, no such prohibition exists for civil defendants. Congress also empowered the D.C. Circuit to review challenges brought by designated foreign terrorist organizations themselves, although the procedures for such review are insufficient to protect First Amendment rights under *McKinney* and *Freedman* (*infra* at 21-28).

The fact that Congress delegated to the courts the power to review terrorist designations under these circumstances undermines the argument implicit in the Ninth Circuit's ruling that Article III judges are not competent to conduct such review in criminal proceedings. Indeed, the *Hamdi* plurality specifically found no reason to doubt that district courts "faced with these sensitive matters will pay proper heed to both the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." *Hamdi*, 542 U.S. at 539 (O'Connor, J., plurality opinion).

Finally, applying the *McKinney* rule would have minimal, if any, impact on the Government's ability to conduct anti-terrorist activities. If in a particular criminal proceeding a court were to find that the Government overreached in its terrorist designation and the donation was constitutionally protected—an unlikely prospect with regard to the overwhelming majority of organizations designated as terrorist—that outcome would affect only that donor. Because there is no non-mutual collateral estoppel against the Government (*United States v. Mendoza*, 464 U.S. 154 (1984)), the group would still

be on the "terrorist" list, and the Government could still freeze the group's assets and deny visas to its members. 18 U.S.C. § 2339B(a)(2); 8 U.S.C. § 1182(a)(3)(B). Future donations would still be deterred by the threat of criminal prosecution.

All the Court would be holding is that an individual facing 10 years in prison may not be precluded from demonstrating that the charged activities are protected by the First Amendment. The alternative upheld by the Ninth Circuit allows donors to be imprisoned for constitutionally protected activity—a result directly inconsistent with *McKinney* and never sanctioned by this Court.

II. THE NINTH CIRCUIT COURT OF APPEALS' DECISION ALSO CONFLICTS WITH THIS COURT'S DECISION IN *FREEDMAN V. MARYLAND*

Even if Congress could deprive a criminal defendant of the *McKinney* right to challenge a "terrorist" designation, to satisfy the First Amendment the process by which an organization is designated would still have to provide sufficient procedural protections to ensure reliability. *Freedman v. Maryland*, 380 U.S. 51 (1965).

This Court has long held that the procedures by which the Government designates conduct as unprotected by the First Amendment must comport with "rigorous procedural safeguards." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *see also Freedman*, 380 U.S. at 60. "Because the line between unconditionally guaranteed speech and speech that may be regulated is a close one, the 'separation of legitimate from illegitimate speech calls for . . . sensitive tools.'" *Southeastern Promotions v. Conrad*, 420 U.S. 546, 561 (1975) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

Since a defendant charged under 18 U.S.C. § 2339B is precluded from defending the legitimacy of a contribution by

showing that the recipient does not meet the criteria for a terrorist organization, the only possible protection for legitimate speech activity lies with the State Department's designation procedures. But as the D.C. Circuit expressly held, the designation procedures lack any of the traditionally recognized procedural safeguards. *PMOI II*, 251 F.3d at 208. And, as Judge Kozinski stated in his dissent, "[w]ithout a proper designation, the money being donated here cannot be deemed anything other than a donation to a legitimate foreign political organization" which is far closer to "pure speech" afforded full First Amendment protections. Pet. App. 13a.

The Ninth Circuit panel failed even to address Petitioners' *Freedman* argument, resting instead on the presumption that there is no First Amendment right at issue in this case. Pet. App. 30a, 31a. In doing so, the court presumed the accuracy of the "terrorist" designation without ever applying the standards established by this Court in *Freedman v. Maryland* and its progeny. As Judge Kozinski demonstrated in his dissent, "the panel has simply overruled *Freedman*—without so much as mentioning it." Pet. App. 11a.

Like the statutes at issue in *Freedman* and *Bantam Books*, a "foreign terrorist organization" designation under 8 U.S.C. § 1189 acts as a "prior restraint" because it allows the Government to determine that particular expressive and associational acts are unprotected in advance of actual expression, and before any judicial review could be pursued. Judge Kozinski's dissent pointed out that "[a] terrorist designation is . . . a type of prior restraint on speech because it criminalizes monetary contributions that would otherwise be protected by the First Amendment." Pet. App. 6a. As this Court has recognized on numerous occasions, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70 (string cite omitted). Moreover, "even where this presumption might otherwise be overcome, the Court has insisted upon

careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

Thus, in *Freedman v. Maryland* and its progeny, this Court has required, *inter alia*, that proceedings that determine an individual's First Amendment rights must be adversarial, must provide for effective judicial review, and must place upon the Government the burden of proving that the activity is *not* First Amendment-protected. *Freedman*, 380 U.S. at 57-58; *see also Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980); *Carroll*, 393 U.S. at 180, 183; *Bantam Books*, 372 U.S. at 70-71; *Southeastern Promotions*, 420 U.S. at 561.

Disregarding this entire line of cases, the Ninth Circuit's decision allowed the State Department's "terrorist" designation to stand as the final determination of First Amendment rights even though all such constitutionally-required procedural safeguards were absent.[12] As the D.C. Circuit acknowledged, the procedures used by the Secretary of State to designate groups as "foreign terrorist organizations" violate "the fundamental requirement of due process." *PMOI II*, 251 F.3d at 208.

Under the statute, the Secretary of State may designate a group as a "foreign terrorist organization" without providing any advance notice to the organization, and then providing only generalized public notice by publishing the listing in the Federal Register. 8 U.S.C. § 1189(a)(2)(A)(ii) (2000), Pet. App. 66a-67a. Any donation to that group becomes a criminal act upon publication in the Federal Register, regardless of actual notice and regardless of whether the designation is correct. 8 U.S.C. § 1189(a)(2)(B)(i) (2000), Pet. App. 67a.

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[12] This Court in *Carroll* expressly noted the "danger in relying on the version of events and dangers presented by prosecuting officials, because of their special interest." *Carroll*, 393 U.S. at 183 n.10.

While a designated organization itself may seek review in the D.C. Circuit, there is nothing close to an adversarial proceeding at either the administrative or judicial stages. *See Freedman*, 380 U.S. at 58. The initial proceedings before the Secretary of State are entirely one-sided because the organization does not even know that they are taking place until after the designation is made. And the judicial review procedures cannot cure that problem because review in the D.C. Circuit is limited to the one-sided administrative record created by the Secretary of State. 8 U.S.C. § 1189(b)(2) (2000), Pet. App. 69a.

In its 2001 opinion in *PMOI II*, the D.C. Circuit required the Secretary of State to provide notice and an opportunity to submit materials in opposition to the listing for those organizations that have sufficient presence in the United States to warrant constitutional protections. *PMOI II*, 251 F.3d at 208-209.[13] Any submission by the designated group would then become part of the record on appeal. But those procedures are of no use to Petitioners because they were not put in place until *after* the PMOI was put on the foreign terrorist organization list in 1997 and 1999 (the designations that form the basis of the indictment).

Nor will these administrative procedures be of any use to the vast majority of other defendants charged with making prohibited contributions because most groups on the terrorist list are outside the United States and have no constitutional rights, and thus the D.C. Circuit decision does not apply to them. *PMOI II*, 251 F.3d at 203.

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[13] After the D.C. Circuit's *PMOI II* decision, Congress amended the statute so that a designated organization may also submit a petition for revocation two years after the initial designation date. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7119(a), 11 Stat. 3801 (2004) (codified at 8 U.S.C. § 1189(a)(4)(B) (2005)).

An organization without sufficient presence in the United States is not only deprived of pre-deprivation notice and an opportunity to be heard, such an organization is also barred from challenging the constitutionality of a designation. *PMOI I,* 182 F.3d at 22. As Judge Kozinski noted, "the only entity that is statutorily eligible to challenge the terrorist designation—the organization being designated—will ordinarily be unable to bring any kind of meaningful challenge." Pet. App. 8a (footnote omitted). Thus, criminal defendants such as Petitioners can be convicted under § 2339B and sentenced to up to 10 years' incarceration even though no court has ever ruled on the constitutionality of the designation.

Moreover, even an organization that has the right to bring a constitutional challenge is precluded from challenging key criteria for the designation. For example, the D.C. Circuit has determined that the decision whether a group is a threat to national security (which under the statute can mean a threat to the "economic interests of the United States") is "non-justiceable." *PMOI I,* 182 F.3d at 23.[14]

Furthermore, "'the burden of instituting judicial proceedings and persuading the courts' that the designation was improper . . . falls on the organization." Pet. App. 8a (Kozinski, J., dissenting) (quoting *Freedman*, 380 U.S. at 60). The organization must demonstrate that the Secretary's decision to designate an organization as a foreign terrorist organization is "arbitrary, capricious, an abuse of discretion," not in accordance with law or constitutional right, or "lacking substantial support in the administrative record." 8 U.S.C. § 1189(b)(3) (2000), Pet. App. 69a. Meeting that burden is nearly impossible because the organization has no right to

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[14] Also, as Judge Kozinski noted, "the statute seems to discourage any judicial determination at all, giving the organization only 30 days to challenge its designation." Pet. App. 8a. Additionally, there are no time limits requiring the D.C. Circuit to act expeditiously. *See Freedman*, 380 U.S. at 58.

view much of the evidence used against it (since the Government may rely upon classified material), no right to cross examine the Government's witnesses, and no meaningful ability to confront other evidence used by the Government, which may include "'third hand accounts, press stories, material on the internet or other hearsay regarding the organization's activities.'" *PMOI II*, 251 F.3d at 196 (quoting *PMOI I*, 182 F.3d at 19); *see also Freedman*, 380 U.S. at 58.

In short, a "foreign terrorist organization" designation will survive the limited judicial review provided by the statute so long as the Secretary of State produces a newspaper article alleging that someone somewhere threatened to do a violent act in the group's name (a "terrorist activity" under 8 U.S.C. § 1182(a)(3)(B)), and asserts that such action, if carried out, might be counter to American economic interests (a threat to the "national security" under 8 U.S.C. § 1189(c)(2)).

Freedman precludes such constitutionally infirm and inherently unreliable designation procedures from determining the First Amendment rights of individuals facing criminal prosecutions. As Judge Kozinski concluded, "as in *Freedman*, the only possible conclusion is that the terrorist organization designation scheme 'fails to provide adequate safeguards against undue inhibition of protected expression,' and therefore is an invalid prior restraint." Pet. App. 9a (quoting *Freedman*, 380 U.S. at 60).[15]

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[15] The governing statute also prohibits the instant prosecution. 8 U.S.C. § 1189(b)(3) requires that the D.C. Circuit "shall hold unlawful and set aside" a designation made in violation of the Constitution. In *PMOI II*, the D.C. Circuit recognized that because it found the designation of the PMOI to violate the Constitution, a "strict and immediate application" of the statute would require "revocation of the designation[]," but it left the designation in place pending remand in light of what it saw as the "realities of . . . foreign policy and national security concerns" and the impending expiration of the designation. *PMOI II*, 251 F.3d at 196, 209. The D.C. Circuit did not address whether the unconstitutional desig-

Unless overturned by this Court, the Ninth Circuit's decision will allow a defendant to be prosecuted for contributing to an organization designated as "terrorist" based upon a designation that the defendant cannot challenge, and that violates the basic procedures this Court has held are constitutionally required to protect speech activity. As Judge Kozinski warns, the panel's decision gives the State Department "carte blanche to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it. Far too much political activity could be suppressed under such a regime." Pet. App. 14a.

For example, suppose the Government were to designate Greenpeace, Solidarity, the African National Congress—which was on a predecessor "terrorist" list in the 1980s—or even a disfavored political party as foreign terrorist organizations. Under Section 2339B, that administrative determination would be conclusive in a criminal prosecution of any individual who donated money to the organization, regardless of the reliability of the underlying determination that the group satisfied the statutory criteria for a terrorist group.

Confronted with a serious threat nearly a half century ago, this Court held that:

> [The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power

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nation of the PMOI in 1999 (or the 1997 designation, which was made with the same unconstitutional procedures) could nonetheless serve as the predicate for a subsequent criminal prosecution of an individual donor, because that issue was not presented.

While 8 U.S.C. § 1189(a)(8) takes the extreme (and, under *McKinney*, unconstitutional) step of precluding a criminal defendant donor from challenging the "terrorist" designation, Congress' simultaneous enactment of Section 1189(b)(3) makes clear its intent that an *unconstitutional* "terrorist" designation could not serve as the basis for a prosecution of a financial contributor. The two provisions cannot be separated. Thus, in addition to the First Amendment problems posed by this case, the statute itself requires reversal of the court of appeals' decision.

> designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For [more than] two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

United States v. Robel, 389 U.S. 258, 264 (1967).

It is this Court's proud history that has ensured that the Government, while protecting the Nation, at the same time respects and safeguards our core constitutional values. Where, as here, a lower court has ignored First Amendment protections and abdicated judicial oversight, it is important that this Court grant review to ensure that the Government acts consistently with the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-50355.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HOSSEIN AFSHARI, aka Hosseini Deklami; Mohammad Omidvar; Hassan Rezaie; Roya Rahmani, aka Sister Tahmineh; Navid Taj, aka Najaf Eshkoftegi; Mustafa Ahmady; Alireza Mohamad Moradi;
Defendants-Appellees.

Filed April 17, 2006
Amended April 28, 2006

Before ANDREW J. KLEINFELD, KIM McLANE WARDLAW, and WILLIAM A. FLETCHER, *Circuit Judges.*

ORDER;

Dissent by Judge Kozinski

The order filed April 17, 2006, denying the petition for rehearing and petition for rehearing en banc is amended as follows:

> After the sentence, "The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration," insert the following sentence: "Judge Fisher and Judge Berzon were recused from all proceedings in this case."

ORDER

The panel has voted unanimously to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Judge Fisher and Judge Berzon were recused from all proceedings in this case. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

KOZINSKI, Circuit Judge, with whom Judges PREGERSON, REINHARDT, THOMAS and PAEZ join, dissenting from denial of rehearing en banc.

It goes without saying that the United States government may prohibit donations to terrorist organizations. As we explained in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir.2000), money is fungible; if an organization engages in terrorism, it can channel money donated to it for humanitarian and advocacy purposes to promote its grisly agenda. At the same time, however, giving money to a political organization that is *not* engaged in terrorist activities is constitutionally protected. The determination of whether or not an organization is engaged in terrorism is therefore crucial, because it distinguishes activities that can be criminalized from those that are protected by the First Amendment.

This case concerns the manner in which this distinction is drawn. Because designating an organization as terrorist cuts off the First Amendment rights of individuals wishing to donate to that organization, the designation must meet certain constitutional standards. The Supreme Court has twice spoken to the question of how the government may go about

turning what would otherwise be protected First Amendment speech into criminal conduct, the first time in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and the second time in *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976). In both cases, the Court laid out strict rules that the government must follow, yet the designation in this case complies neither with *Freedman* nor with *McKinney*. The net result is that Rahmani is being criminally prosecuted, and almost certainly will be convicted, for contributing to an organization that has been designated as terrorist with none of the protections that are constitutionally required for such a designation. Worse, Rahmani will in all likelihood spend many years in prison for contributing to an organization whose designation the D.C. Circuit has held does not even meet the requirements of due process. Because I believe that the prosecution in this case runs contrary to two of our defining traditions-that of free and open expression, and that of justice and fair play-I respectfully dissent from the court's failure to correct the panel's errors by taking this case en banc.

Background

Anyone who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" faces up to 10 years in prison. 18 U.S.C. § 2339B(a)(1).[1] A foreign "terrorist organization" is defined as any organization so designated by the Secretary of State under 8 U.S.C. § 1189(a)(1).[2]

Roya Rahmani was indicted under 18 U.S.C. § 2339B for making monetary contributions to the Mujahedin-e-Khalq (MEK), also known as the People's Mojahedin Organization

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[1] The maximum sentence was increased to 15 years in 2001. *See* USA PATRIOT Act, Pub.L. No. 107-56, § 810(d), 115 Stat. 272, 380 (2001).

[2] All references to 8 U.S.C. § 1189 are to the version in place before the 2001 and 2004 amendments.

for Iran, between 1997 and 2001. *See United States v. Rahmani, sub nom. United States v. Afshari*, 426 F.3d 1150, 1152 (9th Cir.2005). MEK is opposed to the current fundamentalist regime in Iran. *See People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 20-21 (D.C. Cir.1999) ("*PMOI I*"). It was first designated a terrorist organization in 1997, and was re-designated in 1999 and 2001. *See id.* at 18; *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 197 (D.C. Cir.2001) ("*PMOI II*"); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1241 (D.C. Cir.2003) ("*PMOI III*"); *cf.* 8 U.S.C. § 1189(a)(4) (requiring re-designation every two years).

Rahmani argues that MEK is not a terrorist organization, but the crime isn't defined as providing support to an organization that *is* terrorist, only to one that is *designated* as such under 8 U.S.C. § 1189. Further, she is statutorily barred from arguing that the organization is not terrorist in nature, and therefore that her contribution is constitutionally protected. *See* 8 U.S.C. § 1189(a)(8). Not to worry, says the panel; the organization itself can challenge the designation, so Rahmani's First Amendment rights are adequately protected.

The organization's challenges in this case, however, proved futile. MEK brought a legal challenge each time it was designated, under the judicial review provision of the governing statute: "The [D.C. Circuit] Court shall hold unlawful and set aside a designation the court finds to be . . . contrary to constitutional right, power, privilege, or immunity." 8 U.S.C. § 1189(b)(3)(B). When the D.C. Circuit reviewed MEK's 1997 designation, however, it found the organization lacked due process rights and thus could not challenge the designation. *See PMOI I*, 182 F.3d at 22, 25. When MEK was re-designated in 1999 and challenged its new designation, the D.C. Circuit reached the merits[3] and

[3] The D.C. Circuit reviewed the merits of the due process challenge to the designation the second time around only because the State Department

found that the designation *violated due process* because the government did not provide MEK with notice or an opportunity to be heard. *See PMOI II*, 251 F.3d at 196, 208-09. But, instead of setting the designation aside as the statute requires, *see* 8 U.S.C. § 1189(b)(3)(B), the court left the designation in place and remanded the case to the Secretary of State for further proceedings, *see PMOI II*, 251 F.3d at 209. On remand, the Secretary promptly re-designated MEK a terrorist organization *retroactively* for the two-year period ending in 2001. *See PMOI III*, 327 F.3d at 1241. The D.C. Circuit did not uphold this retroactive designation until 2003. *See id.* at 1245.

It is these designations-one of which was found to be unreviewable, one of which was found to be unconstitutional, and the last of which was adopted retroactively-that form the basis of the government's prosecution of Rahmani.

Discussion

It is firmly established that monetary contributions to political organizations are a form of "speech" protected by the First Amendment, *see McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 134-36, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003); *Buckley v. Valeo*, 424 U.S. 1, 16, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), the panel's statements to the contrary notwithstanding, *see Rahmani*, 426 F.3d at 1159-60 ("[W]hat the defendants propose to do is not to engage in speech, but rather to provide material assistance . . . [by] sending money to the MEK."); *id.* at 1160 ("[T]he money sent to the MEK is not [speech]."). In *Humanitarian Law Project*, 205 F.3d at 1133, we held that giving money to a designated terrorist organization is not protected speech. But

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had identified another organization-the National Council of Resistance of Iran (NCRI)-as MEK's "alias." NCRI had enough of a presence in the United States to assert a due process claim. *See Rahmani*, 426 F.3d at 1153.

if the organization is *not* a designated terrorist organization, then monetary contributions to it *are* protected by the First Amendment-maybe not to the same degree as pure speech, but protected nonetheless. A terrorist designation is thus a type of prior restraint on speech, because it criminalizes monetary contributions that would otherwise be protected by the First Amendment.

The panel dismisses Rahmani's First Amendment arguments with conclusory statements that the money here is being given to a *terrorist* organization, and is therefore a completely unprotected form of expression. *See Rahmani*, 426 F.3d at 1160 ("Donations to designated foreign terrorist organizations are not akin to donations to domestic political parties or candidates."). But this begs the question. The crux of the case-the issue the panel has elided in each iteration of its opinion-is the *process* by which the designation was made. If the designation process does not comply with constitutional standards, then the designation is invalid and Rahmani's donations are protected by the First Amendment. In order to determine whether that process was constitutional, we must rely on the guidance of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976).

1. "[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Freedman*, 380 U.S. at 57, 85 S.Ct. 734 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)) (internal quotation marks omitted). In *Freedman*, the Supreme Court detailed the "procedural safeguards" that must accompany prior restraints on speech, setting a high hurdle for the government to clear before a restraint can be held constitutional. *Id.* at 58, 85 S.Ct. 734. *Freedman* concluded that "only a *judicial determination* in an *adversary proceeding* ensures the necessary sensitivity to freedom of expression, [thus] only a procedure requiring a

judicial determination suffices to impose a valid final restraint." *Id.* (emphasis added). The panel ignores *Freedman* entirely, upholding a prior restraint on speech that contains not a single one of *Freedman's* procedural safeguards.

In *Freedman*, the Supreme Court struck down a Maryland censorship scheme in which theaters were banned-on penalty of criminal prosecution-from showing films designated as obscene:

> It is readily apparent that the Maryland procedural scheme does not satisfy [constitutional] criteria. *First,* once the censor disapproves the film, *the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second*, once the Board has acted against a film, *exhibition is prohibited pending judicial review, however protracted.* Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. *Third*, it is abundantly clear that the Maryland statute provides *no assurance of prompt judicial determination.* We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

Id. at 59-60, 85 S.Ct. 734 (emphasis added).

The procedure for designating a foreign terrorist organization has all of the deficiencies identified by the Supreme Court in *Freedman*, and then some. First, once the Secretary of State makes the designation, the prohibition on monetary contributions takes effect immediately, *see* 8 U.S.C. § 1189(a)(2)(B)(i), and "the burden of instituting judicial proceedings and of persuading the courts" that the desig-

nation was improper, *Freedman*, 380 U.S. at 60, 85 S.Ct. 734, falls on the organization. *See* 8 U.S.C. § 1189(b)(1).

Second, monetary contributions to a designated organization are prohibited even while judicial review is pending. *See id.* §§ 1189(a)(2)(B)(i), (b)(4) ("The pendency of an action for judicial review of a designation shall not affect the application of this section, unless the court issues a final order setting aside the designation."); *Freedman*, 380 U.S. at 60, 85 S.Ct. 734. This procedural deficiency is particularly damageing to Rahmani, who made all her donations at least two years before the D.C. Circuit finally approved MEK's designation as a terrorist organization. Third, "it is abundantly clear that the . . . statute provides no assurance of prompt judicial determination." *Id.* To the contrary, the statute seems to discourage any judicial determination at all, giving the organization only 30 days to challenge its designation. *See id.* § 1189(b)(1). What's more, the panel concedes that the D.C. Circuit has found foreign entities have no due process rights: "MEK was a 'foreign entity without . . . presence in this country' and thus 'ha[d] no constitutional rights under the due process clause.' Therefore, the MEK was not entitled to notice and a hearing." *Rahmani*, 426 F.3d at 1153 (quoting *PMOI I*, 182 F.3d at 22) (alterations in original) (footnote omitted). In other words, the only entity that is statutorily eligible to challenge the terrorist designation-the organization being designated-will ordinarily be unable to bring any kind of meaningful[4] challenge. *See* 8 U.S.C. §§ 1189(a)(1)(A), (a)(8), (b)(1).

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[4] I say "meaningful" challenge because, despite finding that MEK had no due process rights, the D.C. Circuit did conduct *some* review of the Secretary's designation as required by the statute. *See* 8 U.S.C. § 1189(b)(3). But all the D.C. Circuit could do was glance at the Secretary's one-sided evidence. "[N]ot surprisingly," the D.C. Circuit found nothing in the Secretary's materials to support MEK's argument that it was erroneously designated. *PMOI I*, 182 F.3d at 24.

Even when an organization can avail itself of the full "judicial review" prescribed by the statute, *see id.* §§ 1189(b)(2) & (3), such review comes nowhere near what *Freedman* requires. The statute uses "APA-like language," *PMOI I*, 182 F.3d at 22, barring the D.C. Circuit from overturning the Secretary's designation unless, for example, it lacks substantial evidence or is arbitrary and capricious. *See* 8 U.S.C. § 1189(b)(3). As the D.C. Circuit noted, under the statute's judicial review provisions, the designated organization "does not have the benefit of meaningful adversary proceedings . . . other than procedural shortfalls so obvious a Secretary of State is not likely to commit them." *PMOI II*, 251 F.3d at 197. But *Freedman* explicitly requires a "*judicial* determination in an *adversary* proceeding" on the merits, not merely a court's cursory check that the agency followed its own procedures. 380 U.S. at 58, 85 S.Ct. 734 (emphasis added). And *Freedman* underscores the inadequacy of *any* agency for making such a judicial determination: "[T]here inheres the danger that [an agency] may well be less responsive than a court-part of an independent branch of government-to the constitutionally protected interests in free expression." *Id.* at 57-58, 85 S.Ct. 734.

As in *Freedman*, the only possible conclusion is that the terrorist organization designation scheme "fails to provide adequate safeguards against undue inhibition of protected expression," and therefore is an invalid prior restraint. *Id.* at 60, 85 S.Ct. 734.

The procedural history of this case perfectly illustrates the patent unconstitutionality of the terrorist organization designation process: Rahmani was indicted for sending money to MEK from 1997 to 2001, the *very years* during which the designation was admittedly unconstitutional.[5] Had the D.C.

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[5] Only the 1999 designation was declared unconstitutional by the D.C. Circuit. *See PMOI II*, 251 F.3d at 197. But the 1999 designation "extended the . . . 1997 designation," the constitutionality of which the court

Circuit followed the letter of the statute, it would have struck down the designation, *see* 8 U.S.C. § 1189(b)(3)(B), and Rahmani could not have been charged with a crime. The State Department could, of course, have re-designated MEK in 2001 using constitutional procedures, but it could not have *retroactively* designated it to criminalize Rahmani's donations.[6] *See* U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto Clause).

No "judicial determination" upheld MEK's designation on its merits until two years *after* Rahmani made her allegedly criminal monetary contributions. *Cf. Freedman,* 380 U.S. at 58, 85 S.Ct. 734. The panel thus condones a uniquely unconstitutional (and oxymoronic) practice: an *ex post facto prior restraint.* The simple fact is that Rahmani is being prosecuted-and will surely be sent to prison for up to 10 years-for giving money to an organization that no one other than some

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never reached in *PMOI I. See id.* The process by which the organization was designated had not changed from 1997 to 1999, so if one was unconstitutional then the other was as well. After *PMOI II* was decided, the designation process was amended to redress the due process problems identified by the court. *See* USA PATRIOT Act § 411(c); *PMOI II,* 251 F.3d at 208-09.

[6] In crafting its remand to the Secretary of State, the D.C. Circuit did not seem to be aware of the effect the designation plays in criminal prosecutions. *See PMOI II,* 251 F.3d at 209. In fact, it explicitly pointed to "the timeline against which [it was] operating," noting that "the two-year designations before us expire in October of this year." *Id.* In other words, it didn't much matter whether the designation was revoked or whether the case was simply remanded for curative measures; even if the civil consequences of MEK's designation had been lifted, they could have been reimposed almost immediately when MEK was re-designated.

The same cannot be said for criminal prosecutions premised on the designation: Contributing material support to an organization *not* designated a terrorist organization cannot subject a person to criminal sanction just because the same organization is later so designated. Had the D.C. Circuit revoked MEK's designation in 2001-as it was required to do under the statute-Rahmani's donations from 1997 to 2001 would have been perfectly legal, even if MEK was subsequently re-designated.

obscure mandarin in the bowels of the State Department had determined to be a terrorist organization. The panel has simply overruled *Freedman*-without so much as mentioning it.

2. The panel's opinion also contravenes *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976). *McKinney* involved a criminal defendant charged with selling a magazine that had previously been declared obscene in a separate in rem action. The Supreme Court, in an opinion by Justice Rehnquist, held that the defendant had a right to argue *at his own trial* that the magazine was not actually obscene and was thus protected by the First Amendment. *See id.* at 674-76, 96 S.Ct. 1189. *McKinney* thus stands for the proposition that a criminal defendant has an individual right to challenge the exclusion of what would otherwise be protected speech from the protection of the First Amendment.

The panel here holds that, because MEK had an opportunity to challenge its terrorist designation, *see* 8 U.S.C. § 1189(b)(1), Rahmani can be precluded from arguing in her own defense that MEK is not actually a terrorist organization. It is not at all clear to me that a constitutional challenge that can (maybe) be raised only by a third party in a separate proceeding can *ever* be an adequate substitute for the procedures specified in *McKinney*. Assuming, however, that such a third-party procedure is constitutionally permissible, on the theory perhaps that mere political contributions do not merit the same lofty constitutional protection as the smutty magazines in *McKinney*, what actually happened in this case surely cannot be sufficient to strip Rahmani of all First Amendment protections. As will be recalled, MEK *did* litigate its designation in the courts and the designation was held to be unconstitutional. This is how the D.C. Circuit described the procedure used:

> The unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point in the pro-

> ceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record. . . . The Secretary may base the findings on classified material, to which the organization has no access at any point during or after the proceeding to designate it as terrorist. . . . Thus the entity does not have the benefit of meaningful adversary proceedings on any of the statutory grounds, other than procedural shortfalls so obvious a Secretary of State is not likely to commit them.

PMOI II, 251 F.3d at 196-97. This is the process the panel holds is sufficient to extinguish Rahmani's First Amendment rights. What good is the organization's right to challenge its designation if the outcome-in this case, that the designation was unconstitutional-is entirely ignored? Moreover, how can a procedure that was judicially determined to violate due process be an adequate substitute for the type of direct challenge that *McKinney* requires?

The *McKinney* portion of the panel's opinion is premised on the fact that the organization was properly designated as a terrorist organization, and that the designation had already been subject to judicial review. The panel states:

> What is at issue here is not anything close to pure speech. It is, rather, material support to foreign organizations that the United States has deemed, *through a process defined by federal statute and including judicial review by the D.C. Circuit,* a threat to our national security. . . . The "foreign terrorist organization" designation means that the Executive Branch has determined-*and the D.C. Circuit,* in choosing not to set aside the designation, *has concluded that the determination was*

> *properly made*-that materially supporting the organization is materially supporting actual violence.

Rahmani, 426 F.3d at 1160 (emphasis added). But, as described above, the D.C. Circuit explicitly concluded that the designation in this case was *not* "properly made." Thus, the panel's argument-the very foundation of its attempt to distinguish this case from *McKinney*-is entirely beside the point.

Without a proper designation, the money being donated here cannot be deemed anything other than a donation to a legitimate foreign political organization-much closer to the "pure speech" at issue in *McKinney*. Monetary donations may not receive the full strict scrutiny protection that pure political speech receives, *see McConnell*, 540 U.S. at 137, 124 S.Ct. 619, but heightened scrutiny still applies, *see id.* at 143, 124 S.Ct. 619 (holding that campaign contributions can be limited because "the prevention of corruption or its appearance constitutes a *sufficiently important interest*" (emphasis added)).

The panel's final attempt to distinguish this case from *McKinney* based on "deference [to] the Executive Branch in the area of national security" fares no better. *Rahmani*, 426 F.3d at 1161. What possible relevance could national security have once the terrorist designation was declared unconstitutional? The panel pretends the designation was valid and that it can therefore refer to MEK as a terrorist organization. But until such a determination is properly made, asserting the presence of a national security concern is mere speculation-hardly a sufficient substitute for the individual procedural right granted in *McKinney*.

3. Why does the panel ignore common sense and find this whole scheme constitutional? Because, it says, it "do[es] not have authority to reverse the decisions of a sister circuit," *id.* at 1156, and "it would be contrary to the statutory scheme for us to hold that the designation was invalid," *id.* at 1157. But the remedy Rahmani seeks requires neither: The D.C. Circuit's opinion in *PMOI II*, which found the designation

unconstitutional but remanded to the Secretary of State without setting the designation aside, said nothing about use of the designation in criminal prosecutions; thus, there is nothing to "reverse." *See PMOI II*, 251 F.3d at 209; note 6 *supra*. Nor is there a need to strike down the designation; the designation, and the many civil consequences that flow from it, need not be disturbed. *See PMOI II*, 251 F.3d at 196 (civil consequences of designation include, for example, blocking funds deposited with U.S. financial institutions and denying certain members of the organization entry into the United States). The panel need only hold that a designation found by the D.C. Circuit to be unconstitutional cannot form the basis of a criminal prosecution.

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I can understand the panel's reticence to interfere with matters of national security, but the entire purpose of the terrorist designation process is to determine *whether* an organization poses a threat to national security. Under the Constitution, the State Department does not have carte blanche to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it. Far too much political activity could be suppressed under such a regime.

In any event, our task in this case was simple. The D.C. Circuit had already done all of the hard work, examining MEK's designation and finding it to be constitutionally inadequate. All we had to do was take the next logical step and hold that this inadequate designation could not form the basis for a criminal prosecution. The Supreme Court hasn't hesitated to take a close look at the constitutionality of certain war on terror-related procedures-especially procedures that are still being tested and developed. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). We should be no less vigilant.

[+] Please note that the asterisks appear in Judge Kozinski's dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-50355

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA INC; THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; and CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
Intervenors,[*]

v.

HOSSEIN AFSHARI, aka Hosseini Deklami; Mohammad Omidvar; Hassan Rezaie; Roya Rahmani, aka Sister Tahmineh; Navid Taj, aka Najaf Eshkoftegi; Mustafa Ahmady; Alireza Mohamad Moradi,
Defendants-Appellees.

Argued and Submitted Sept. 9, 2003
Filed Oct. 20, 2005

Appeal from the United States District Court for the Central District of California; Robert M. Takasugi, District Judge, Presiding. D.C. No. CR-01-00209-RMT.

Before: KLEINFELD, WARDLAW, and W. FLETCHER, *Circuit Judges*.

[*] Please note that the caption is incorrect. The three organizations listed as intervenors are not intervenors, but are amici curiai in support of defendants-appellees.

KLEINFELD, *Circuit Judge*:

We review the constitutionality of a statute prohibiting financial support to organizations designated as "terrorist."

Facts

The issue here is the constitutionality of the crime charged in the indictment, that from 1997 to 2001, Rahmani and others knowingly and willfully conspired to provide material support to the Mujahedin-e Khalq ("MEK"),[1] a designated terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1).[2]

According to the indictment, the defendants solicited charitable contributions at the Los Angeles International Airport for the "Committee for Human Rights," gave money and credit cards to the MEK, and wired money from the "Committee for Human Rights" to an MEK bank account in Turkey. They did all this after participating in a conference call with an MEK leader, in which they learned that the State Department had designated the MEK as a foreign terrorist organization. The MEK leader told them to continue to provide material support despite the designation. According to the indictment in this case, the money they sent to the MEK amounted to at least several hundred thousand dollars.

The MEK was founded in the 1960's as an Iranian Marxist group seeking to overthrow the regime then ruling Iran. It participated in various terrorist activities against the Iranian regime and against the United States, including the taking of American embassy personnel as hostages in 1979. After the Iranian regime fell and was replaced by a clerical, rather than a Marxist, regime, MEK members fled to France. They later settled in Iraq, along the Iranian border. There they carried

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[1] The MEK is also known as the People's Mojahedin Organization for Iran, or PMOI, and has a variety of other aliases.

[2] In 1997, the Secretary of State designated the MEK as a foreign terrorist organization under 8 U.S.C. § 1189.

out terrorist activities with the support of Saddam Hussein's regime,[3] as well as, if the indictment is correct, the money that the defendants sent them.

The MEK, since first being designated a terrorist organization, has developed a convoluted litigation history in the United States Court of Appeals for the District of Columbia. Because this history is important to the outcome of this case, we will briefly review the relevant parts.

The MEK was first designated a terrorist organization in 1997. The D.C. Circuit upheld this designation because the MEK was a "foreign entity without . . . presence in this country" and thus "ha[d] no constitutional rights under the due process clause."[4] Therefore, the MEK was not entitled to notice and a hearing. It also found the administrative record sufficient to establish that the MEK "engages in terrorist activity."[5] In the process of designating MEK a terrorist organization in 1999, the State Department determined that another organization, the National Council of Resistance of Iran, was an "alias" of the MEK.[6] When reviewing the 1999 designation, the D.C. Circuit held that the second organization had a presence in the United States and, based on that presence, that both organizations were entitled to "the opportunity to be heard at a meaningful time and in a meaningful manner."[7]

The D.C. Circuit remanded the 1999 designation to the State Department with the instructions that both organizations

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[3] The 1997-2001 period of the conspiracy charged in the indictment was during Saddam Hussein's regime.

[4] *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir.1999).

[5] *Id.* at 24-25.

[6] *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 197 (D.C.Cir.2001).

[7] *Id.* at 208.

be given an opportunity "to file evidence in support of their allegations that they are not terrorist organizations."[8] Instead, the MEK submitted evidence showing that it was responsible for numerous assassinations of Iranian officials and mortar attacks on Iranian government installations.[9] Upon reviewing this redesignation, the D.C. Circuit noted that any procedural due process error that might have existed was harmless because the MEK had "effectively admitted" that it was a terrorist organization.[10]

For purposes of reviewing a motion to dismiss an indictment, we assume the truth of what the indictment alleges.[11] Thus, we take it as true that the defendants knew that they were furnishing assistance to a designated "terrorist" organization, having been informed of the designation in a conference call with an MEK leader.

The district court dismissed the indictment on the ground that the terrorist designation statute[12] was unconstitutional. We review de novo,[13] and reverse.

Analysis

I. Challenging the designation.

8 U.S.C. § 1189(a)(1) sets out a carefully articulated scheme for designating foreign terrorist organizations. To make the designation, the Secretary has to make specific findings that "the organization is a foreign organization"; that "the organization engages in terrorist activity (as defined in

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[8] *Id.*

[9] *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C.Cir.2003).

[10] *Id.*

[11] *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996).

[12] 8 U.S.C. § 1189.

[13] *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991).

8 U.S.C. § 1182(a)(3)(B))"; and that "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States."[14]

The Secretary of State's designation is only the beginning. The Secretary also must furnish the congressional leadership advance notification of the designation and the factual basis for it, which Congress can reject.[15] The designation is published in the Federal Register.[16] The designated organization is entitled to judicial review of the Secretary's action in the United States Court of Appeals for the District of Colum-

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[14] 8 U.S.C. § 1182(a)(3)(B)(iii). Terrorist activity defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed . . . and which involves any of the following:

(I) The highjacking or sabotage of any conveyance . . .

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm . . . , with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

22 U.S.C. § 2656f(d)(2). [T]he term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.

[15] 8 U.S.C. § 1189(a)(2)(A)(i).

[16] *Id.* § 1189(a)(2)(A)(ii).

bia.[17] That court is directed to set aside the designation for the ordinary administrative law reasons, such as that the designation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[18] That court must also set aside a designation for several other reasons, including that the designation is "contrary to constitutional right, power, privilege, or immunity."[19] Congress or the Secretary can revoke a designation.[20] Among the concrete incentives that a designated organization has to contest the designation is that the Secretary of the Treasury may require American financial institutions to block all financial transactions involving its assets.[21]

The district court found that it was a facially unconstitutional restriction on judicial review of the designation for Congress to assign such review exclusively to the D.C. Circuit. We reject that position.

Many administrative determinations are reviewable only by petition to the correct circuit court, bypassing the district court, and that procedure has generally been accepted.[22] Many are reviewable only in the D.C. Circuit, or the Federal Circuit, and those restrictions have also been generally accepted.[23] The congressional restriction does not interfere

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[17] *Id.* § 1189(c)(1).

[18] *Id.* § 1189(c)(3)(A).

[19] *Id.* § 1189(c)(3)(B).

[20] *Id.* § 1189(a)(5), (6).

[21] *Id.* § 1189(a)(2)(C).

[22] *See, e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); *Lockerty v. Phillips*, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943) (holding that a district court lacked jurisdiction to hear a challenge to price controls under the Emergency Price Controls Act where Congress had vested judicial review for such challenges in an Emergency Court of Appeals).

[23] *See, e.g.*, 47 U.S.C. § 402(b) (vesting exclusive jurisdiction in the

with the opportunity for judicial review, as the MEK's extensive litigation history shows. And this scheme avoids the awkwardness of criminalizing material support for a designated organization in some circuits but not others, as varying decisions in the different regional circuits might.

However, a holding that a restriction of judicial review of the Secretary of State's designation of a terrorist organization to the Court of Appeals for the D.C. Circuit is not facially unconstitutional does not settle the question whether a defendant may be criminally prosecuted for donating to a designated organization. A defendant prosecuted in district court for donating to such an organization may bring a due process challenge to his or her prosecution in the district court. The district court properly ruled that it had jurisdiction to review this challenge. But its conclusion that § 1189 is facially unconstitutional, because judicial review of the terrorist designation was assigned exclusively to the D.C. Circuit, was in error.

II. Due Process claim.

The statute assigns criminal penalties to one who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so."[24] The statutory phrase "terrorist organization" is a term of art,

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D.C. Circuit over appeals from certain decisions and orders of the Federal Communications Commission).

[24] 18 U.S.C. § 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities—

(1) Unlawful conduct—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

defined by Congress as "an organization designated as a terrorist organization" under 8 U.S.C. § 1189(a)(1).[25] The defendants' central argument is that § 2339B denies them their constitutional rights because it prohibits them from collaterally attacking the designation of a foreign terrorist organization. This contention was recently rejected by the Fourth Circuit en banc.[26] We, too, reject it.

The specific section that is at issue here is 8 U.S.C. § 1189(a)(8), which states in relevant part:

> If a designation . . . has become effective . . . a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.

The defendants are right that § 1189(a)(8) prevents them from contending, in defense of the charges against them under 18 U.S.C. § 2339B, that the designated terrorist organization is not really terrorist at all. No doubt Congress was well aware that some might claim that "one man's terrorist is another man's freedom fighter." Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of United States Attorneys and juries. Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.

The question then is whether due process prohibits a prosecution under § 2339B when the court vested with the

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[25] 18 U.S.C. § 2339(B)(g)(6).

[26] *United States v. Hammoud*, 381 F.3d 316 (4th Cir.2004) (en banc).

power to review and set aside the predicate designation determines that the designation was obtained in an unconstitutional or otherwise erroneous manner, but nevertheless declines to set it aside. In reviewing MEK's 1999 designation, the D.C. Circuit found that "the designation does violate the due process rights of the petitioners under the Fifth Amendment" because the designation process did not afford MEK notice or an opportunity to be heard.[27] The D.C. Circuit did not vacate the designation, citing foreign policy and national security concerns as well as the fact that the designation would be expiring shortly.[28] Instead it left the designation in place and remanded to the Secretary of State with instructions that MEK be afforded due process rights.[29]

Defendants argue that the D.C. Circuit's failure to vacate the 1999 designation after finding a due process violation is incompatible with § 1189's "shall . . . set aside" language, and thus that the statute prohibits using the designation as a valid predicate for a subsequent prosecution. But we do not have authority to reverse the decisions of a sister circuit. Nor do we have the authority to review the State Department's designation because the statute confers that jurisdiction exclusively in the D.C. Circuit.

Nor, although the plain language of § 1189(c)(3) appears to be mandatory, is the D.C. Circuit's approach inconsistent with precedent in analogous situations. Section 1189(c)(3) is nearly identical to § 706 of the Administrative Procedure Act, and the remedy the D.C. Circuit used here—remand without vacatur—has been used several times under the APA.[30]

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[27] *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196, 200 (D.C.Cir.2001).

[28] *Id.* at 209.

[29] *Id.*

[30] *See, e.g., Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir.1995).

Though not entirely uncontroversial, remand without vacatur has long been supported by Supreme Court precedent,[31] had been utilized before the enactment of § 1189 in 1996, and was well-established when Congress modified elements of § 1189 in 2001 and 2004 without altering the judicial review procedure. Thus, despite the seemingly mandatory language in the statute, we believe § 1189(c)(3) can reasonably be read as the D.C. Circuit read it, to allow the remand of a designation without vacating it. This is especially so in this case, because the designation would have been unobjectionable if, as it initially appeared, the MEK was located entirely abroad and had no American location, and was, in any event, harmless because the MEK proudly proclaimed its own terrorist activities. Moreover, we will not lightly contradict in a collateral proceeding such as this a co-equal court's well established interpretation of a statute. Defendants' statutory argument therefore fails.

Defendants further claim that the Due Process Clause prevents a designation found to be unconstitutional from serving as a predicate for the charge of providing material support to a designated terrorist organization, even if the designation has never been set aside.[32] There are several reasons why this argument lacks force.

First, the Supreme Court in *Lewis v. United States* held that a prior conviction could properly be used as a predicate for a subsequent conviction for a felon in possession of a firearm, even though it had been obtained in violation of the Sixth

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[31] *See, e.g., Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

[32] It bears noting that we are not addressing the constitutionality of a statute lacking in judicial review. To the contrary, § 1189 explicitly provides for judicial review, and the designation at issue in this case withstood judicial review when the D.C. Circuit let the MEK's 1999 designation stand.

Amendment right to counsel.[33] The Court held that it was proper to prohibit a collateral attack on the predicate during the criminal hearing because the felon-in-possession statute made no exception "for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason."[34] The Court noted that the prohibition on collateral attack was proper because a convicted felon could challenge the validity of the conviction before he purchased his firearm.[35]

The defendants attempt to distinguish *Lewis* from this § 2339B prosecution because the defendant in *Lewis* had the ability to challenge his predicate, whereas here the defendants themselves are prohibited from challenging the designation. But this does not change the principle that a criminal proceeding may go forward, even if the predicate was in some way unconstitutional, so long as a sufficient opportunity for judicial review of the predicate exists. Here there was such an opportunity, which the MEK took advantage of each time it was designated a foreign terrorist organization.[36]

Second, the D.C. Circuit declined to set aside the 1999 designation. It remanded the determination but carefully explained that it did not vacate the designation.[37] After the remand, the D.C. Circuit upheld the redesignation; therefore, at all relevant times, the "foreign terrorist organization"

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[33] *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980).

[34] *Id.* at 62, 100 S.Ct. 915.

[35] *Id.* at 64, 100 S.Ct. 915.

[36] *See People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (D.C.Cir.1999); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C.Cir.2001); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C.Cir.2003).

[37] *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C.Cir.2001).

designation had been in full force. This court and the D.C. Circuit are co-equal courts. We cannot reverse its decision.[38] Additionally, the statute expressly provides that only the D.C. Circuit may review these designations,[39] so it would be contrary to the statutory scheme for us to hold that the designation was invalid. We have already determined that any constitutional challenge against 8 U.S.C. § 1189 "must be raised in an appeal from a decision to designate a particular organization" and must be heard in the D.C. Circuit.[40]

Third, 18 U.S.C. § 2339B only requires that Rahmani, et al., had knowledge of the MEK's designation as a foreign terrorist organization. The Fourth Circuit, sitting en banc, held that a criminal defendant charged under this statute cannot bring a challenge to the validity of a designation of an organization as "terrorist." In a case where there was no indication that the designation was invalid (other than the defendant's would-be challenge), the Fourth Circuit wrote, "[T]he *fact* of an organization's designation as an [terrorist organization] is an element of § 2339B, but the *validity* of the designation is not."[41] Here, the MEK has been designated a terrorist organization throughout the relevant period, and that designation has never been set aside. According to the indictment, defendants had knowledge of this designation, they were told during a telephone conference call with an MEK

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[38] *See Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 183 (3rd Cir.1976) (ruling on an "official opinion of a court of another circuit . . . is undesirable on policy grounds alone").

[39] 8 U.S.C. § 1189(c); *See also Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir.2000) (the statute "provides for judicial review of the Secretary's decision in the" D.C. Circuit).

[40] *Humanitarian Law Project*, 205 F.3d at 1137.

[41] *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir.2004) (en banc) (emphasis in original), *rev'd on other grounds*, --- U.S. ----, 125 S.Ct. 1051, 160 L.Ed.2d 997 (2005), reinstated in part, 405 F.3d 1034 (4th Cir.2005).

leader in October 1997 that the MEK had been designated a foreign terrorist organization by the State Department.

Fourth, as discussed earlier, the D.C. Circuit ultimately held that the procedural due process violation it identified was harmless. When challenging the 1999 designation, the MEK admitted to numerous terrorist acts making an argument that amounted to a claim that the enemy of our enemy is our friend,[42] a decision that is committed to the Executive Branch, not the courts. Due to this "admission," the D.C. Circuit held that, even if there were a due process violation, the MEK was not harmed by it.

Thus, defendants' new due process argument attacks a designation that withstood judicial review, that we have no authority to review, that defendants knew was in place throughout the period of the indictment, and that is supported by the MEK's own submission. Defendants suffered no deprivation of due process, and even if they had, it was harmless.

The defendants further attempt to distinguish *Lewis*, a Supreme Court decision adding that a prior conviction is an adequate predicate for a "felon in possession" charge even if the prior conviction was obtained unconstitutionally, by relying on *United States v. Mendoza-Lopez*.[43] In that case, the Supreme Court held that a prosecution under 8 U.S.C. § 1326 for illegal reentry does not comport with due process if there is no judicial review of whether the predicate depor-

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[42] MEK "argues that the attempt to overthrow the despotic government of Iran, which itself remains on the State Department's list of state sponsors of terrorism, is not 'terrorist activity,' or if it is, that it does not threaten the security of the United States or its nationals." *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1244 (D.C. Cir.2003).

[43] *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987).

tation proceeding violated the alien's rights.[44] It is not at all clear from *Mendoza-Lopez* that the Supreme Court meant that the due process problem is in the *later* proceeding. The Court held that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding."[45] Nothing in *Mendoza-Lopez* appears to require that this review be had by the defendant in the subsequent criminal proceeding.

Furthermore, it is obvious in *Lewis* and *Mendoza-Lopez* that the opportunity to seek review would be in the hands of the defendants themselves because it was *their* rights at issue in the hearing that created the predicate in the later criminal proceeding. But here, the defendants' rights were not directly violated in the earlier designation proceeding. The predicate designation was against the MEK, not the defendants. Section 1189 provides for the organizations to seek review of the predicate designation, and that review was had in this case. Therefore, due process does not require another review of the predicate by the court adjudicating the instant § 2339B criminal proceeding.

Our holding is further supported by our decision in *United States v. Bozarov*.[46] In *Bozarov*, we held that a defendant charged with exporting items listed under the Export Administration Act without a license did not have a due process right to collaterally attack the listing in his criminal proceeding.[47] We held, however, that Bozarov had standing to challenge the constitutionality of the Export Act in his criminal proceeding.[48] This was because the Export Act explicitly

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[44] *Id.* at 837-38, 107 S.Ct. 2148.

[45] *Id.* (emphasis in original).

[46] *United States v. Bozarov*, 974 F.2d 1037 (9th Cir.1992).

[47] *Id.* at 1045-46.

[48] *Id.* at 1040-41.

provided that all actions taken by the Secretary of Commerce under it were "not subject to judicial review," including a denial of the license that was a predicate for a violation of the criminal provision.[49] If a defendant were not allowed to challenge the Export Act in that proceeding, there would be *no* arbiter of the constitutionality of the Export Act. In contrast, Congress has explicitly provided that the D.C. Circuit is the arbiter of the constitutionality of any designation under § 1189. Thus, there is no constitutional need for the defendants to challenge the predicate designation in this proceeding.

As we noted in another case where we rejected a defendant's right to challenge an export listing in a subsequent criminal proceeding, the defendants' argument here "is analogous to one by a defendant in a drug possession case that his conviction cannot stand because no specific showing has been made that the drug is a threat to society. . . . [A] showing that the drug possessed by the individual defendant has a 'detrimental effect on the general welfare' [is not] an element of the offense."[50] Likewise, the element of the crime that the prosecutor must prove in a § 2339B case is the predicate fact that a particular organization *was* designated at the time the material support was given, not whether the government made a correct designation. Our position is consistent with that of the Fourth Circuit, which held that a defendant's inability to challenge the designation was not a violation of his constitutional rights, since the *validity* of the designation is not an element of the crime.[51] Rather, the element is the

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[49] *Id.* at 1039.

[50] *United States v. Mandel*, 914 F.2d 1215 n. 11 (9th Cir.1990) (quoting *Spawr Optical Research, Inc. v. Baldrige*, 649 F.Supp. 1366, 1372 n. 10 (D.D.C. 1986)).

[51] *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir.2004) (en banc).

fact of an organization's designation as a "foreign terrorist organization."[52]

III. First Amendment claim.

The defendants argue that the MEK is not a terrorist organization, and that they have a right under the First Amendment to contribute money to it. The argument is: (1) they have a First Amendment right to contribute to organizations that are not terrorist; (2) the statutory scheme denies them the opportunity to challenge the "foreign terrorist organization" designation; so therefore (3) it deprives them of their First Amendment right to make contributions to non-terrorist organizations.

This argument is mistaken because what the defendants propose to do is not to engage in speech, but rather to provide material assistance. The statute says "knowingly provides material support or resources to a foreign terrorist organization."[53] The indictment charges them with sending money to the MEK.

The defendants argue that they seek to express their political views, not by supporting terrorism, but rather by supporting an organization that the State Department has mistakenly designated as terrorist.[54] The due process part of this argument, that they are entitled to an opportunity in their criminal proceeding to relitigate whether the MEK is terrorist, is addressed above. Defendants also make a distinct free speech argument, however, based on *McKinney v. Alabama*.[55]

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[52] *Id.*

[53] 18 U.S.C. § 2339B(a)(1).

[54] This is an odd argument since the MEK itself has admitted that it has attacked various Iranian government organizations, assassinated several Iranian officials, and targeted Iranian Supreme Leader Khamenei for assassination. *See People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C.Cir.2003).

[55] *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976).

McKinney holds that the First Amendment rights of a newsstand proprietor were violated by his conviction under a statute that prohibited him from selling an obscene magazine.[56] What is similar to this case is that the obscenity of the magazine in *McKinney* was adjudicated, not in the criminal defendant's proceeding, but in a previous in rem proceeding against the magazine to which the newsstand proprietor was not a party.[57] The Court held that a decision in another proceeding could not conclusively determine First Amendment rights to sell a magazine of persons who had no notice and opportunity to be heard in that proceeding.[58] By analogy, the defendants in this case argue that they should be entitled to litigate the terrorism designation of the MEK in their criminal case.

The argument fails, however, because the cases are not analogous. The magazine in *McKinney* was speech, the money sent to the MEK is not. Though contributions of money given to fund speech receive some First Amendment protection,[59] it does not follow that all contributions of money are entitled to protection as though they were speech.

What is at issue here is not anything close to pure speech. It is, rather, material support to foreign organizations that the United States has deemed, through a process defined by federal statute and including judicial review by the D.C. Circuit, a threat to our national security. The fact that the support takes the form of money does not make the support the equivalent of speech. In this context, the donation of money could properly be viewed by the government as more

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[56] *Id.* at 673, 96 S.Ct. 1189.

[57] *See id.*

[58] *Id.* at 674, 96 S.Ct. 1189.

[59] *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

like the donation of bombs and ammunition than speech.[60] The "foreign terrorist organization" designation means that the Executive Branch has determined—and the D.C. Circuit, in choosing not to set aside the designation, has concluded that the determination was properly made—that materially supporting the organization is materially supporting actual violence.

Donations to designated foreign terrorist organizations are not akin to donations to domestic political parties or candidates. An organization cannot be designated unless it is foreign,[61] so domestic associations are immune from the scheme. And in this case, there is no room for a vagueness challenge on the ground that the defendants were merely contributing what might arguably be in the nature of speech.[62] The indictment charges them with sending money to the designated terrorist organization, not with providing instruction or advocacy.

We have already held that the strict scrutiny standard applicable to speech regulations does not apply to a prohibition against sending money to foreign terrorist organizations.[63] That a group engages in politics and has political goals does not imply that all support for it is speech, or that it promotes its political goals by means of speech. Guns and bombs are not speech. Sometimes money serves as a proxy for speech, and sometimes it buys goods and services that are not speech. The government "may certainly regulate contributions to organizations performing unlawful or harmful activities, even though such contributions may also express the donor's feel-

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[60] *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir.2000).

[61] 8 U.S.C. § 1189(a)(1)(A).

[62] *Cf. Humanitarian Law Project*, 205 F.3d at 1137.

[63] *Id.* at 1135.

ings about the recipient."[64] There is no First Amendment right "to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions."[65]

A less rigorous standard of review is applied to monetary contributions than to pure speech.[66] Even giving money to perfectly legitimate political expression within the United States can be, and is, restricted by Congress, and such restrictions are consistent with the Constitution.[67] *A fortiori*, contribution of money to foreign organizations that the United States has determined engage in terrorist activities can be restricted by Congress.[68] It would be anomalous indeed that Congress could restrict the contribution of money for television commercials that say why a candidate would be a good or bad choice for political office, yet could not prohibit contribution of money to a foreign group that the government determines engages in terrorist activities. Defendants are entitled under the First Amendment to publish articles arguing that the MEK is not really a terrorist organization, but they are not entitled to furnish bombs to the MEK, nor to furnish money to buy bombs and ammunition.

The deference due the Executive Branch in the area of national security reinforces our conclusion that furnishing material assistance to foreign terrorist organizations must be distinguished from the *McKinney* issue, furnishing obscene magazines.[69]

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[64] *Id.*

[65] *Id.* at 1133.

[66] *McConnell*, 540 U.S. at 137, 124 S.Ct. 619.

[67] *See id.; Buckley*, 424 U.S. at 20, 96 S.Ct. 612 ("[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.").

[68] *See Humanitarian Law Project*, 205 F.3d at 1133.

[69] *See Regan v. Wald*, 468 U.S. 222, 242, 104 S.Ct. 3026, 82 L.Ed.2d

In *McConnell*, the Court found that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."[70] The interest in protecting our country from foreign terrorist organizations is *a fortiori* "a sufficiently important interest." "[T]he federal government clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities."[71] "[W]e must allow the political branches wide latitude in selecting the means to bring about the desired goal" of "preventing the United States from being used as a base for terrorist fundraising."[72]

Conceivably the MEK developed its practices at a time when the United States supported the previous regime in Iran, and maintained its position while harbored by the Saddam Hussein Ba'ath regime in Iraq. Maybe the MEK's position will change, or has changed, so that its interest in overturning the current regime in Iran coincides with the interests of the United States. Defendants could be right about the MEK. But that is not for us, or for a jury in defendants' case, to say. The sometimes subtle analysis of a foreign organization's political program to determine whether it is indeed a terrorist threat to the United States is particularly within the expertise of the State Department and the Executive Branch.[73] Juries could not make reliable determinations without extensive foreign

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171 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 72 S.Ct. 512, 96 L.Ed. 586 (1952)); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (rejecting due process challenge to the Secretary of State's refusal to validate passports of United States citizens to travel to Cuba).

[70] *McConnell*, 540 U.S. at 143, 124 S.Ct. 619.

[71] *Humanitarian Law Project*, 205 F.3d at 1135.

[72] *Id.* at 1136.

[73] *See Nat'l Council of Resistance of Iran*, 251 F.3d 192.

policy education and the disclosure of classified materials. Nor is it appropriate for a jury in a criminal case to make foreign policy decisions for the United States. Leaving the determination of whether a group is a "foreign terrorist organization" to the Executive Branch, coupled with the procedural protections and judicial review afforded by the statute, is both a reasonable and a constitutional way to make such determinations. The Constitution does not forbid Congress from requiring individuals, whether they agree with the Executive Branch determination or not, to refrain from furnishing material assistance to designated terrorist organizations during the period of designation.

REVERSED.

APPENDIX C

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

No. CR01-209-RMT

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROYA RAHMANI, *et al.*,
Defendants.

June 21, 2002

MEMORANDUM ORDER GRANTING DEFENDANTS' MOTION TO DISMISS INDICTMENT BASED ON RECENT D.C. CIRCUIT CASE

TAKASUGI, *District Judge.*

This matter came before the court for hearing on March 11, 2002 on Defendant Roya Rahmani's motion to dismiss the indictment based on a recent D.C. Circuit opinion, in which Defendants Mustafa Ahmady, Navid Taj, Mohammad Omidvar, Alireza Mohammadmoradi, Hassan Rezaie, and Hossein Afshari have filed joinders. Defendants' motion requires me to provide a resolution to the following somewhat provocative question:

If the procedure whereby an organization is designated by the Secretary of State as "terrorist" violates the Due Process Clause of the United States Constitution, may such designation nevertheless be utilized as a predicate in a criminal prosecution against individuals for providing material support to that designated terrorist organization?

Facts:

The indictment in the instant action charges defendants ROYA RAHMANI, MUSTAFA AHMADY, HOSSEIN AFSHARI, ALIREZA MOHAMMADMORADI, MOHAMMAD OMIDVAR, NAVID TAJ and HASSAN REZAIE (hereafter "defendants") with conspiracy and 58 substantive counts of providing material support to the Mujahedin-e Khalq ("MEK"), a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1)[1] (hereafter "Section 2339(B)"). The indictment describes solicitations, wire transfers and monetary donations by the defendants that took place from October 8, 1997 through February 27, 2001, all for the benefit of the MEK.

The relevant statute:

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214-1319 (1996) to address concerns regarding international terrorism. Title III of the AEDPA, 110 Stat. 1247, entitled "International Terrorism Prohibition," was designed to cut off monetary and other support for such terrorist activities. In relevant part, AEDPA prohibits persons from knowingly providing "material support or resources" to "foreign terrorist organizations." 18 U.S.C. § 2339B(a)(1).

Specifically, the AEDPA authorizes the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, to designate an organization as a "foreign

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[1] 18 U.S.C. § 2339B provides, in relevant part, that:

> Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B

terrorist organization" pursuant to 8 U.S.C. § 1189 (hereafter "Section 1189") if the Secretary finds that the organization is a foreign organization that engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) and the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States. Classified information may be considered in designating an organization and the Secretary is required to create an administrative record in support of the designation. 8 U.S.C. § 1189(a).

In making a designation, the Secretary, by classified communication, must notify several high ranking members of Congress of the intent to designate a foreign organization, together with the findings and factual basis in support of the foreign terrorist designation. Seven days after notification to such high ranking members of Congress, the designation is published in the Federal Register. *The organization to be designated is not informed of the designation prior to publication.* The designation persists for a period of two years and is renewable by the Secretary. Congress may block or subsequently revoke a designation by an Act of Congress. The Secretary may also revoke a designation based on changed circumstances. However, the revocation of a designation does not affect any action or proceeding based on conduct committed prior to the effective date of such revocation. 8 U.S.C. § 1189(a).

For purposes of a prosecution under Section 2339(B), the designation takes effect immediately upon publication in the Federal Register. Once effective, a defendant in a criminal action is precluded from raising any question concerning the validity of the designation as a defense or an objection at any trial or hearing. Furthermore, any assets of the designated organization held in United States financial institutions may be frozen. 8 U.S.C. § 1189(a).

Within 30 days following publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit (hereafter "D.C. Circuit"). The court's review is based solely upon the administrative record, except that the government may submit, for *ex parte* and *in camera* review, classified information used in making the designation. 8 U.S.C. § 1189(b).

The D.C. Circuit court must hold unlawful and set aside a designation that it finds to be:(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (ii) *contrary to constitutional right*, power, privilege, or immunity; (iii) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (iv) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court, or (v) not in accord with the procedures required by law. Finally, the pendency of an action for judicial review does not alter or diminish the effectiveness of the designation, unless the court issues a final order setting aside the designation. 8 U.S.C. § 1189(b).

The relevant case law:

In June of 2001, the D.C. Circuit issued its opinion in *Nat'l Council of Resistance of Iran (NCRI) v. Dept. of State*, 251 F.3d 192 (D.C.Cir.2001) (hereafter "*NCRI*"). The court stated that a unique feature of the foreign terrorist organization designation procedure is:

> the dearth of procedural participation and protection afforded the designated entity. At no point in the proceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record. Noth-

> ing in the statute forbids the use of "third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities . . . ." [citation omitted]. The Secretary may base the findings on classified material, to which the organization has no access at any point during or after the proceeding to designate it as terrorist.
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> * * * * * *
>
> [U]nder the AEDPA the aggrieved party has had no opportunity to either add to or comment on the contents of that administrative record; and the record can, and in our experience generally does, encompass "classified information used in making the designation," as to which the alleged terrorist organization never has any access, and which the statute expressly provides the government may submit to the court *ex parte* and *in camera*.

NCRI, 251 F.3d at 196-97.

The *NCRI* court found that a foreign terrorist organization designation worked a deprivation of property on the designated organization, the National Council of Resistance of Iran,[2] because there was a colorable claim that the organization had an interest in a bank account, which interest would be frozen under Section 1189. *Id.* at 204. Therefore, the court held that the Secretary of State must afford the limited due process available to a putative foreign terrorist organization prior to the deprivation resulting from designating that entity as such in the Federal Register. To provide due process in designating an entity as a "foreign terrorist

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[2] The NCRI is an alias for the People's Mujahedin Organization of Iran, PMOI, Mujahedin-e Khalq Organization, MEK, MKO, Mujahedin-e Khalq, National Council of Resistance, and NCR. 64 FR 55112, 55012. Any reference in this opinion to any one of NCRI's aliases should be understood to refer to all of the aliases listed in this footnote.

organization," the Secretary of State must afford the entity prior notice of the designation. However, upon an adequate showing to the court, the Secretary may provide post-designation notice where earlier notification would impinge upon the security and other foreign policy goals of the United States. *Id.* at 208. Such a showing was not made by the Secretary in the *NCRI* case.[3]

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[3] The *NCRI* court stated:

> It is simply not the case, however, that the Secretary has shown how affording the organizations whatever due process they are due before their designation as foreign terrorist organizations and the resulting deprivation of right would interfere with the Secretary's duty to carry out foreign policy.
>
> To oversimplify, assume the Secretary gives notice to one of the entities that:
>
> > We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization.
> >
> > It is not immediately apparent how the foreign policy goals of the government in general and the Secretary in particular would be inherently impaired by that notice. It is particularly difficult to discern how such a notice could interfere with the Secretary's legitimate goals were it presented to an entity such as the PMOI [an alias for the MEK and NCRI] concerning its redesignation. We recognize, as we have recognized before, that items of classified information which do not appear dangerous or perhaps even important to judges might "make all too much sense to a foreign counterintelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods." [Citation omitted] We extend that recognition to the possibility that alerting a previously undesignated organization to the impending designation as a foreign terrorist organization might work harm to this county's [sic] foreign policy goals in ways that the court would not immediately perceive. We therefore wish to make plain that we do not foreclose the possibility of the Secretary, in an appropriate

The *NCRI* court further counseled that as soon as the Secretary of State determines that it will designate an entity as a "foreign terrorist organization", the Secretary must, in order to comply with due process guarantees, provide notice of those unclassified items upon which he proposes to rely to the entity to be designated. There must also be compliance with the hearing requirement of due process jurisprudence, that is, the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 209. The Secretary of State need not provide a hearing closely approximating a judicial trial to comply with due process guarantees when designating an entity as a "foreign terrorist organization." Nevertheless, the Secretary must afford an entity considered for imminent designation the opportunity to present, at least in written form, such evidence as it might be able to produce to rebut the administrative record or otherwise negate the proposition that it is a foreign terrorist organization. *Id.*

The *NCRI* court found that the NCRI was designated as a foreign terrorist organization in compliance with the designation statute but in violation of due process. *Id.* at 196.[4] The *NCRI* court, though acknowledging that the Secretary

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> case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made. *The difficulty with that in the present case is that the Secretary has made no attempt at such a showing.*

NCRI, 251 F.3d at 207-08 [emphasis added].

[4] The *NCRI* court explained that

> the statutory judicial review is limited to the adequacy of the record before the court to support the Secretary's executive decision. That record is currently compiled by the Secretary without notice or opportunity for any meaningful hearing. We have no reason to presume that the petitioners in this particular case could have offered evidence which might have either changed the Secretary's mind or affected the adequacy of the record. However, without the due process protections which we have outlined, we cannot presume the contrary either.

NCRI, 251 F.3d at 209.

made no showing of national security concerns, nevertheless, did not set aside the existing designation, relying upon unstated national security concerns for its position! Instead, the court remanded the issue to the Secretary with instructions that the entity be afforded the opportunity to file responses to the non-classified evidence against it, introduce evidence to support its allegations that it is not a terrorist organization, and be given an opportunity to be meaningfully heard by the *Secretary upon the relevant findings*. *NCRI*, 251 F.3d at 208-09. The Secretary of State, after complying with the procedural actions called for by the *NCRI* court, reaffirmed the foreign terrorist organization designation ascribed to NCRI and its alias MEK. The MEK has filed a petition with the D.C. Circuit to review the Secretary's reaffirmation decision, which review is currently pending.

Analysis:

Defendants launch a multi-pronged attack to dismiss the indictment in this case. Defendants contend that the 1999 designation of the MEK may not be used as a predicate in the instant criminal prosecution because the designation statute, both facially and under *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987), violates due process. Additionally, defendants contend that the indictment charges them with raising money for the Committee for Human Rights ("CHR"), an entity which has not been designated as a foreign terrorist organization. Finally, defendants aver that the uncertainty surrounding whether the MEK should be considered a foreign terrorist organization should dissuade this court from using the 1999 designation as a predicate in the instant criminal proceeding. The latter contentions shall be considered first.

The uncertainty of the foreign terrorist designation raises a political question.

Defendants argue that there is uncertainty regarding the propriety of designating the MEK as a foreign terrorist organization.[5] Members of Congress have opined that the MEK is a legitimate resistance movement fighting the tyrannical regime presently in power in Iran.[6] According to these members of Congress, the MEK prevented the Iranian regime from obtaining nuclear weapons; provided information to the U.S. regarding Iran-sponsored bombing attacks on Israeli interests; and supports the Middle East peace process.[7] Finally, members of Congress have stated that the MEK is not engaged in terrorist activities but, rather, in a legitimate struggle for an Iran of democracy, religious tolerance, human rights and non-violence.[8]

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[5] At the outset, this court notes that defendants are not attacking the indictment on First Amendment grounds. Although, at first blush, defendants' "uncertainty" argument sounds similar to a constitutional attack on vagueness grounds, such is not the case. Under the vagueness doctrine, a law which does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process. Here, Section 1189 is clear on how an entity is to be designated as a foreign terrorist organization and defendants do not contend otherwise. Instead, defendants contend that the MEK's designation is "uncertain" and should not be relied upon in the instant prosecution because Congress has the ability to revoke the MEK's designation and a large number of Congressmen and Senators have voiced their support for the MEK. As such, the doctrine of vagueness is not implicated in defendants' "uncertainty" argument.

[6] *See* Exh. C to Puathasnanon Decl. (letter from Senator Torricelli to President Clinton, dated October 22, 1997, criticizing State Department's decision to designate the PMOI, another name for the MEK).

[7] *See* Exh. F to Puathasnanon Decl. (letter from Representatives Ros-Lehtinen and Ackerman to Secretary of State Colin Powell, dated August 31, 2001, citing reasons for removal of the PMOI's foreign terrorist organization designation).

[8] *See* Exh. E. to Puathasnanon Decl. (Congress Media Advisory, dated October 11, 2000, and New York Times article, dated November 3, 2000,

Defendants argue that the designation of the MEK may not be relied upon in a criminal prosecution where, as here, the foregoing statements by members of Congress create uncertainty as to the propriety of such designation. Defendants seem to aver that, since a number of members of Congress view the MEK favorably, and since Section 1189 provides for revocation of the terrorist designation by an Act of Congress, the designation should not be relied upon in the instant prosecution.

Whether the MEK is a foreign terrorist organization presents a political question. "Political questions" are controversies which revolve around policy choices and value determinations constitutionally committed to the Congress or the Executive Branch, and are not subject to judicial review. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court identified six independent factors indicative of a political question:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the poten-

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reporting that 228 members of the House of Representatives signed a "Statement on Iranian Policy" supporting the goals of the National Council of Resistance-another name for the NCRI, PMOI and MEK).

> tiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691. Implicating any one of these factors renders a question "political" and thus nonjusticiable. *Armstrong v. United States*, 759 F.2d 1378, 1380 (9th Cir.1985).

Here, the executive branch, through the Secretary of State, and some members of the legislative branch differ on whether the MEK is a foreign terrorist organization. Section 1189 provides the statutory mechanisms for Congress or the executive branch to clear the MEK of its terrorist designation, if it so wishes.[9] For this court to weigh in on this debate would create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. 691. Moreover, Congress, and not the courts, has the fact-finding resources to conclude how best to prevent the United States from being used as a base for terrorist fundraising. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir.2000).

That being said, once the *decision* to designate is made, this court has the duty to scrutinize the designation *procedure* for conformance with the Constitution. *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803)("if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.")

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[9] Section 1189 contemplates revocation of a designation by an Act of Congress (8 U.S.C. § 1189(4)(B)(5)) or by the Secretary of State based on a change in circumstances (8 U.S.C. § 1189(4)(B)(6)).

The indictment is not defective for alleging that the CHR is a front for the MEK.

The indictment charges that defendants AHMADY, AFSHARI, and MOHAMMADMORADI "would solicit donations to the Committee for Human Rights ('CHR'), a front organization for the MEK . . . knowing and intending that these donated funds were going to the MEK." Indictment at 2:18-23. Defendants contend that the CHR has not been designated as a foreign terrorist organization or even an alias of one and, therefore, there can be no criminal liability under Section 2339B for providing material support to the CHR.

In analyzing a pretrial motion to dismiss, this court must presume the truth of the allegations in the charging instruments. *U.S. v. Caicedo*, 47 F.3d 370, 371 (9th Cir.1995). Here, a careful reading of the indictment indicates that the defendants solicited monies which were knowingly and intentionally directed to the MEK. Accordingly, there is no defect in the indictment warranting dismissal where, as here, the indictment charges that the ultimate destination of the solicited funds is a designated foreign terrorist organization.

Defendants next aver that any allegation regarding solicitation by the defendants under the guise of the CHR should be stricken because the government will not use these allegations to support the criminal charge. Reply at 15:16-19. I must reject this request. The government may allege defendants' use of the CHR as a front to solicit funds for the MEK since such activity is part and parcel of the alleged criminal scheme.

Finally, defendants argue that the government cannot establish that fundraising for the CHR was, in fact, fundraising for the MEK and, therefore, the indictment should be limited to what the government can prove. Reply at 15:9-23. However, a defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are

not supported by adequate evidence. *U.S. v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996). Accordingly, the indictment is not defective by virtue of its mention of the CHR.

The defendants may raise the constitutionality of Section 1189 in this proceeding.

This court ordered further briefing on the issue of whether the defendants can raise the unconstitutionality of Section 1189 as a defense when the statute did not violate their due process rights. The government avers that if the D.C. Circuit or the Supreme Court struck down Section 1189 as unconstitutional defendants would then be entitled to raise this defense in the instant motion to dismiss. The government is essentially saying that this court is without power to review the constitutionality of Section 1189. "[This] would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration." *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803).

The D.C. Circuit is not the sole arbiter of Section 1189's constitutionality.

The parties both agree that the D.C. Circuit is the sole venue for judicial review of a designation pursuant to Section 1189. I do not share this view. Although Section 1189 directs judicial review of foreign terrorist organization designations to the D.C. Circuit, such review is not *restricted* to that court. Before a statute will be construed to restrict access to judicial review there must be clear and convincing evidence of Congressional intent to impose such a restriction. *Johnson v. Robison*, 415 U.S. 361, 373-74, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).

Here, Section 1189(b)(1) provides that "an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit." This language does not evince a clear and convincing congressional intent to

foreclose judicial review of a designation by other federal courts and, therefore, does not make the D.C. Circuit the sole arbiter of Section 1189's constitutionality.

In addition to the plain language of Section 1189, I am duty bound to pass on Section 1189's constitutionality. This court understands its oath to uphold the Constitution and apply only those laws made in conformance to, and pursuance of, the Constitution. I will not abdicate this duty and allow this criminal case to proceed if the evidence indicates that one element of the offense (the foreign terrorist designation) was procured in violation of the Constitution.

Finally, if, as the government contends, defendants are bound by the D.C. Circuit's judicial review of the MEK's designation then justice and fairness require that such judicial review be effective. However, the tribunal entrusted with reviewing the MEK's designation admitted to its inability to conduct an effective judicial review of the designation.[10] Moreover, the tribunal entrusted with reviewing the MEK's designation for compliance with the Constitution allowed such designation to persist while, in the same opinion, acknowledging that such designation was obtained in violation of due process. For the foregoing reasons, I believe the D.C. Circuit is not the sole arbiter of Section 1189's constitutionality.

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[10] *See People's Mojahedin Organization of Iran v. U.S. Department of State*, 182 F.3d 17, 19 (D.C.Cir.1999) ("The information recited [in the administrative record] is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.") *See also NCRI*, 251 F.3d at 208 ("That [administrative] record is currently compiled by the Secretary without notice or opportunity for any meaningful hearing. We have no reason to presume that the petitioners in this particular case could have offered evidence which might have either changed the Secretary's mind or affected the adequacy of the record. However, without the due process protections we have outlined, we cannot presume the contrary either.")

Defendants may raise the constitutionality of Section 1189 as a defense.

The government next contends that Section 1189 expressly precludes defendants from challenging the MEK's designation as a defense in a trial or hearing.[11] Relying upon Section 1189, the government argues that the *NCRI* court's opinion regarding the unconstitutionality of the designation procedure may not be raised as a basis for dismissal. I respectfully disagree.

As a district judge I am duty bound to scrutinize the laws applied in my court for conformance with the Constitution lest I apply an unconstitutional law. *See Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803); *U.S. v. Raines*, 362 U.S. 17, 20, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—'the gravest and most delicate duty that this Court is called on to perform.'") *quoting Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J.); and *Duhart v. Carlson*, 469 F.2d 471, 474 (10th Cir.1972) (same).

The instant Section 2339(B) prosecution relies upon a designation obtained in violation of due process. I will not abdicate my responsibilities as a district judge and turn a blind eye to the constitutional infirmities of Section 1189 when it supplies a necessary predicate to the charged offense. Moreover, my duty to review a statute for constitutionality is

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[11] 8 U.S.C. § 1189(a)(8) provides that "[i]If a designation under this subsection has become effective under paragraph (1)(B), a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing."

of the greatest import where, as here, defendants stand to suffer criminal penalties through the operation of such statute.

Finally, Section 1189(a)(8) is an impermissible limitation on the federal courts' jurisdiction to hear constitutional challenges to the sufficiency of an indictment. Congress may not exercise its power over federal jurisdiction in a manner that would violate the due process clause or other provisions of the Constitution. *See Battaglia v. General Motors*, 169 F.2d 254 (2d Cir.1948). To prevent the legislature from using the federal courts to accomplish unconstitutional ends, the power of Congress to limit the courts' jurisdiction must be tempered by the due process guarantees of the Fifth Amendment. *See id.* at 257.

Section 1189(b)(1) only provides a right to judicial review to designated foreign terrorist organizations. Combined with Section 1189(a)(8), individual defendants facing a Section 2339(B) prosecution never have an opportunity to challenge the underlying designation. Thus, Section 1189 violates the defendants' due process rights because defendants, upon a successful Section 2339(B) prosecution, are deprived of their liberty based on an unconstitutional designation they could never challenge. Accordingly, I believe defendants may raise the constitutionality of Section 1189 as a defense and I now turn to the merits of such a defense.

Section 1189 does not violate U.S. v. Mendoza-Lopez.

Defendants' initial submissions in support of its motion to dismiss relied, in large part, on *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987). In *Mendoza-Lopez*, the Court precluded the government from using a prior deportation against a defendant if it was the result of a due process violation and such violation was prejudicial. *Mendoza-Lopez*, 481 U.S. at 840, 107 S.Ct. 2148. Defendants contend that *Mendoza-Lopez* mandates dismissal of the indictment because, according to *NCRI*, the

MEK's designation as a foreign terrorist organization violated due process. Therefore, defendants aver that such designation cannot be used to prove a predicate to the charged offense.

The government responds that the MEK suffered no prejudice as a result of the designation proceeding. Prejudice requires a showing of a reasonable probability that, but for the due process violation, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, no prejudice could have inured to the NCRI because the same result obtained after the due process defects were purportedly cured. Since no prejudice inured to the NCRI, defendants cannot prove the prejudice necessary for a *Mendoza-Lopez* violation. Accordingly, defendants' *Mendoza-Lopez* argument falls.[12]

Section 1189 is unconstitutional on its face.

The parties were ordered to submit additional briefing addressing whether Section 1189 is unconstitutional on its face because the express language of Section 1189 denies a designated organization the opportunity to be heard in a meaningful manner. This issue arises because of two specific provisions of Section 1189. Section 1189(a)(3)(A) provides that "[i]n making a designation under this subsection, the Secretary shall create an administrative record." Section 1189(b)(2) provides that "[r]eview under this subsection shall be based solely upon the administrative record, except that the Government may submit, for *ex parte* and *in camera* review, classified information used in making the designation."

Considering these two subsections together, Section 1189 provides for judicial review based *solely* on an administrative record created by the Secretary, without notice to or par-

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[12] A further elaboration of the "as applied" analysis is discussed in fn. 14, *infra*.

ticipation by the organization to be designated. Moreover, apart from the administrative record, the only other matter that may be considered for judicial review is classified information provided *by the government* in support of the designation. Thus, Section 1189, by its express terms, provides the designated organization with no notice and no opportunity to object to the administrative record or supplement it with information to contradict the designation.

A facial challenge to the constitutionality of a statute is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the statute would be valid. *Myers v. San Francisco*, 253 F.3d 461, 467 (9th Cir.2001). Thus, a statute is facially constitutional if there is at least one set of circumstances under which it could be valid. *Id.* at 469, n. 1. The government contends that Section 1189 is capable of at least two constitutional applications and, therefore, survives any facial attack.

The government first proffers the case of *People's Mojahedin Organization of Iran ["PMOI"] v. U.S. Dept. of State*, 182 F.3d 17 (D.C.Cir.1999) as evidence of one constitutional application of Section 1189. However, the *PMOI* court did not address whether the entity in that case was designated in compliance with constitutional principles. In fact, the *PMOI* court explicitly found that the entity had neither presence nor property in the U.S. and, therefore, did not enjoy any constitutional rights. *Id.* at 22 ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise. [ ] Whatever rights the LTTE and the MEK enjoy . . . are therefore *statutory rights only.*" [Emphasis added.])

There are several problems with viewing *PMOI* as one constitutional application of Section 1189. At the outset, I don't believe a statute's constitutionality is ascertainable where it is applied to an entity or individual who does not

enjoy constitutional rights. Such a holding would, I believe, violate the justiciability requirements of standing and the prohibition against advisory opinions. Moreover, Section 1189 should not be immune from facial attack simply because it can be applied to an entity that does not enjoy constitutional rights. If such were the case, no statute would fall to a facial challenge because the statute could always be applied to a person or entity unto whom the statute works no constitutional violation. Taken to its logical extreme, such a result would effectively eviscerate the doctrine of facial invalidity. Accordingly, I find that *PMOI* does not illustrate one constitutional application of Section 1189[13] such as to save Section 1189 from facial attack.[14]

The government next avers that the *NCRI* opinion illustrates a constitutional application of Section 1189. The *NCRI* court did not suffer from any of the justiciability concerns that existed in *PMOI*. Presented with the issue of Section 1189's constitutionality, the *NCRI* court detailed the due process failings of Section 1189 and remanded the mat-

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[13] On June 14, 2002, the D.C. Circuit issued its opinion in *32 County Sovereignty Committee, et al. v. Department of State*, 292 F.3d 797 (C.A.D.C.2002), wherein the court denied the designated entity's petition for judicial review because the entity did not have a constitutional presence in the U.S. The foregoing analysis regarding *PMOI* is equally applicable to *32 County Sovereignty* since both cases were decided on identical grounds.

[14] Assuming *arguendo* that Section 1189 may be applied to entities with no constitutional rights, such an application is not extant here since the MEK enjoys constitutional rights. Therefore, even if defendants' facial challenge to Section 1189 fails, an "as applied" challenge to Section 1189 would still succeed where, as here, the designated entity enjoys constitutional rights. This is so because, as I will attempt to explain, Section 1189 violates the NCRI's due process rights by denying the NCRI a meaningful hearing. Moreover, the *NCRI* opinion does not save Section 1189 from an "as applied" constitutional attack since the D.C. Circuit rewrote Section 1189 in *NCRI*, in violation of the doctrine of separation of powers.

ter to the Secretary with instructions that the designated organization be afforded procedural safeguards not provided for in Section 1189.

In assessing the constitutional validity of a statute, courts are to construe the statute to avoid constitutional problems and to resolve any ambiguities in favor of the interpretation that most closely supports constitutionality. *Myers*, 253 F.3d at 468. Thus, contends the government, the *NCRI* court's "construction" of Section 1189 saves the statute from any claim of facial invalidity. However, this is no longer judicial construction; it is impermissible judicial legislation. *See Tillema v. Long*, 253 F.3d 494, 500-01 (9th Cir.2001) (where a statute permits only one permissible interpretation, it is not the province of the federal courts to rewrite the statute to accommodate a different interpretation); *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984) (courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement); *Lucht v. Molalla River School District*, 225 F.3d 1023, 1029 (2000) (same); *Artuz v. Bennett*, 531 U.S. 4, 10, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000) (same).

If I were to accept the government's "construction" argument, I would obliterate any distinction between a facial and as applied challenge to a statute. A court faced with a facially unconstitutional statute could simply "construe" non-existent provisions into a statute to save it from unconstitutionality. Such a result was not countenanced in *Aptheker v. Secretary of State*, 378 U.S. 500, 515, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964)("It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it." [Citation omitted.]). Accordingly, I do not find that the *NCRI* opinion illustrates a

constitutional construction of Section 1189 that would save the statute from a claim of facial invalidity.

The government, in footnote 4 of its supplemental brief, raises two additional arguments in support of its position. Although the arguments are irrelevant to the claim that Section 1189 is facially invalid, they deserve some discussion because they highlight the import of this decision. First, the government argues that invalidating Section 1189 would have serious negative consequences on this country's counter-terrorism efforts. National security is certainly a matter of grave concern and responsibility. When weighed against a fundamental constitutional right which defines our very existence, the argument for national security should not serve as an excuse for obliterating the Constitution. Every effort should be made to weigh the circumstances where national security concerns can rationally coexist within a constitutional atmosphere. No such attempts were made by the Secretary.

The moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections.[15] Such protections should not be dis-

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[15] It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

> "[ ] '[I]f society is disturbed by civil commotion-if the passions of men are aroused and the restraints of law weakened, if not disregarded-these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unim-

pensed with where the Secretary has not shown how the MEK is a national security threat. *NCRI*, 251 F.3d at 207-08.

The government also cites, in footnote 4 of its supplemental brief, numerous cases where the Supreme Court found statutes unconstitutional but, nevertheless, upheld actions that occurred under the unconstitutional scheme. The government seems to be saying that the result in *NCRI*, wherein the D.C. Circuit found the MEK's designation unconstitutional but, nevertheless, upheld such designation, is legally supportable.

The cases cited by the government are distinguishable from the instant case in one critical respect—they are all civil cases. Where, as here, a criminal defendant is charged with crimes that could result in as much as 15 years imprisonment or more, this court will not abdicate its duty to ensure that the prosecution of such charges comports with due process. I have no doubt that, in similar circumstances, the courts listed in footnote 4 of the government's supplemental briefing would do the same. Having established that Section 1189 admits of no constitutional application, I find that Section 1189 is facially invalid.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). "[T]hese principles require . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting [one's] own arguments and

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paired the blessings of liberty, consecrated by the sacrifices of the Revolution.' "

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) *quoting Ex Parte Milligan*, 4 Wall. 2, 71 U.S. 2, 123, 18 L.Ed. 281 (1866).

evidence orally." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Section 1189(a)(3)(A) and Section 1189(b)(2) admit of no other interpretation but that the organization to be designated is precluded from challenging the facts contained in the administrative record or presenting evidence to rebut the proposition that it is a terrorist organization. Such provisions are unconstitutional as violative of due process and render Section 1189 facially invalid.

"[A] law repugnant to the constitution is void, and [the] courts, as well as other departments, are bound by [the constitution]." *Marbury*, 5 U.S. at 180. Section 1189 is invalid since its express provisions are repugnant to the due process clause of the Constitution.[16] Therefore, it follows that a designation pursuant to Section 1189 is a nullity since it is the product of an unconstitutional statute. When a statute is found to be violative of the Constitution, any action taken thereunder, i.e., a designation of a status authorized by such statute, must likewise fail. Any other conclusion is viewed as logically antagonistic.

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. at 163. Defendants have a vested legal right not to be deprived of liberty or property without due process of law. Nevertheless, the government seeks to effect such

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[16] That the D.C. Circuit did not set aside the MEK's designation is a matter separate and apart from the constitutionality of the statute. As stated earlier, the *NCRI* court's decision to uphold the designation was based on a record compiled solely by the Secretary, the veracity of which the D.C. Circuit harbored serious reservations. The fact that a designation was supportable based on a one-sided record does not cloak the designation *procedure* in a veil of constitutionality.

deprivations upon defendants based partly on an unconstitutional statute. However, the MEK's designation, having been obtained in violation of the Constitution, is a nullity and cannot serve as a predicate in a prosecution for violation of Section 2339B. Accordingly, when an organization is designated as a foreign terrorist organization pursuant to Section 1189, such designation is a nullity and cannot be relied upon in a prosecution under Section 2339B.

IT IS ORDERED that the motion to dismiss indictment based on recent D.C. Circuit opinion filed by defendants ROYA RAHMANI, MUSTAFA AHMADY, HOSSEIN AFSHARI, ALIREZA MOHAMMADMORADI, MOHAMMAD OMIDVAR, NAVID TAJ and HASSAN REZAIE is hereby GRANTED.[17]

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[17] The government argues that the defendants can only challenge the 1999 designation on the basis of the D.C. Circuit's opinion in *NCRI* and, therefore, any charges in the indictment that predate the 1999 designation are not subject to dismissal. I respectfully disagree. Section 1189's language has remained unchanged since its inception in AEDPA in 1996 to the present. As such, the statute operated as unconstitutionally in 1996 as it did in 1999. In fact, a close reading of the *PMOI* opinion (which dealt with the 1997 designation of the MEK) indicates that the D.C. Circuit would have reached the same result as it did two years later in the *NCRI* opinion if the entity had a constitutional presence in the United States. Therefore, the motion to dismiss is granted as to all counts and all defendants.

APPENDIX D

18 U.S.C. § 2339B (2000)*

Sec. 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited Activities.—

(1) Unlawful conduct.—Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

(2) Financial institutions.—Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall—

(A) retain possession of, or maintain control over, such funds; and

(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) Civil Penalty.—Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of—

(A) $50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

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* Please note: this is the version of 18 U.S.C. § 2339B in effect on March 13, 2001, when Petitioners were indicted. Subsequent amendments made to this statute are not reflected in this text.

(c) Injunction.—Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(d) Extraterritorial Jurisdiction.—There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Investigations.—

(1) In general.—The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

(2) Coordination with the department of the treasury.—The Attorney General shall work in coordination with the Secretary in investigations relating to—

(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

(B) civil penalty proceedings authorized under subsection (b).

(3) Referral.—Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

(f) Classified Information in Civil Proceedings Brought by the United States.—

(1) Discovery of classified information by defendants.—

(A) Request by United States.—In any civil proceeding under this section, upon request made ex parte and in writing

by the United States, a court, upon a sufficient showing, may authorize the United States to—

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Order granting request.—If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(C) Denial of request.—If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

(2) Introduction of classified information; precautions by court.—

(A) Exhibits.—To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

(B) Determination by court.—The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

(3) Taking of trial testimony.—

(A) Objection.—During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) Action by court.—In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including—

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

(C) Obligation of defendant.—In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

(4) Appeal.—If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

(5) Interlocutory appeal.—

(A) Subject of appeal.—An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court—

(i) authorizing the disclosure of classified information;

(ii) imposing sanctions for nondisclosure of classified information; or

(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.

(B) Expedited consideration.—

(i) In general.—An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

(ii) Appeals prior to trial.—If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

(iii) Appeals during trial.—If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals—

(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial;

(II) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(III) shall render its decision not later than 4 days after argument on appeal; and

(IV) may dispense with the issuance of a written opinion in rendering its decision.

(C) Effect of ruling.—An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

(6) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

(g) Definitions.—As used in this section—

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning as in section 2339A;

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

8 U.S.C. § 1189 (2000)*

Sec. 1189. Designation of foreign terrorist organizations

(a) Designation

(1) In general

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and

(C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

(2) Procedure

(A) Notice

Seven days before making a designation under this subsection, the Secretary shall, by classified communication—

(i) notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees, in writing, of the intent to designate a foreign organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor; and

(ii) seven days after such notification, publish the designation in the Federal Register.

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* Please note: this is the version of 8 U.S.C. § 1189 in effect on March 13, 2001, when Petitioners were indicted. Subsequent amendments made to this statute are not reflected in this text.

(B) Effect of designation

(i) For purposes of section 2339B of title 18, a designation under this subsection shall take effect upon publication under subparagraph (A).

(ii) Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.

(C) Freezing of assets

Upon notification under paragraph (2), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.

(3) Record

(A) In general

In making a designation under this subsection, the Secretary shall create an administrative record.

(B) Classified information

The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

(4) Period of designation

(A) In general

Subject to paragraphs (5) and (6), a designation under this subsection shall be effective for all purposes for a period of 2 years beginning on the effective date of the designation under paragraph (2)(B).

(B) Redesignation

The Secretary may redesignate a foreign organization as a foreign terrorist organization for an additional 2-year period at the end of the 2-year period referred to in subparagraph (A) (but not sooner than 60 days prior to the termination of such period) upon a finding that the relevant circumstances described in paragraph (1) still exist. The procedural requirements of paragraphs (2) and (3) shall apply to a redesignation under this subparagraph.

(5) Revocation by Act of Congress

The Congress, by an Act of Congress, may block or revoke a designation made under paragraph (1).

(6) Revocation based on change in circumstances

(A) In general

The Secretary may revoke a designation made under paragraph (1) if the Secretary finds that—

(i) the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation of the designation; or

(ii) the national security of the United States warrants a revocation of the designation.

(B) Procedure

The procedural requirements of paragraphs (2) through (4) shall apply to a revocation under this paragraph.

(7) Effect of revocation

The revocation of a designation under paragraph (5) or (6) shall not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

(8) Use of designation in trial or hearing

If a designation under this subsection has become effective under paragraph (1)(B), a defendant in a criminal action shall

not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.

(b) Judicial review of designation

(1) In general

Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

(2) Basis of review

Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation.

(3) Scope of review

The Court shall hold unlawful and set aside a designation the court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or*

(E) not in accord with the procedures required by law.

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* So in original. The comma probably should be a semicolon.

(4) Judicial review invoked

The pendency of an action for judicial review of a designation shall not affect the application of this section, unless the court issues a final order setting aside the designation.

(c) Definitions

As used in this section—

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "national security" means the national defense, foreign relations, or economic interests of the United States;

(3) the term "relevant committees" means the Committees on the Judiciary, Intelligence, and Foreign Relations of the Senate and the Committees on the Judiciary, Intelligence, and International Relations of the House of Representatives; and

(4) the term "Secretary" means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.

8 U.S.C. § 1182(a)(3)(B) (2000)*

Sec. 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

* * *

(3) Security and related grounds

* * *

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity,

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iii)),

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity,

(IV) is a representative (as defined in clause (iv)) of a foreign terrorist organization, as designated by the Secretary under section 1189 of this title, or

(V) is a member of a foreign terrorist organization, as designated by the Secretary under section 1189 of this title, which the alien knows or should have known is a terrorist organization** is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liber-

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* Please note: this is the version of 8 U.S.C. §1182(a)(3)(B) in effect on March 13, 2001, when Petitioners were indicted. Subsequent amendments made to this statute are not reflected in this text.

** So in original. Probably should be followed by a comma.

ation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(iv) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

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No. 06-241

In the Supreme Court of the United States

ROYA RAHMANI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Congress has prohibited the provision of material support to entities designated by the Secretary of State as Foreign Terrorist Organizations (FTOs). Petitioners were indicted for providing money to a foreign entity that had been so designated by the Secretary. That designation was in effect at all relevant times, and its validity has been upheld by the District of Columbia Circuit in challenges brought by the organization. The questions presented are as follows:

1. Whether petitioners are entitled under the First Amendment to challenge in their own criminal proceedings the validity of the Secretary's designation of an FTO.

2. Whether petitioners may constitutionally be prosecuted for providing money to a group whose designation as an FTO was effective when petitioners provided the money and was ultimately upheld by the District of Columbia Circuit.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-35a) is reported at 426 F.3d 1150. The opinion of the district court (Pet. App. 36a-59a) is reported at 209 F. Supp. 2d 1045.

JURISDICTION

The court of appeals entered its judgment on October 20, 2005. A petition for rehearing was denied on April 17, 2006 (Pet. App. 1a-14a). On June 14, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 15, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1247. Congress viewed a prohibition on material support for terrorist organizations as "absolutely necessary to achieve the government's compelling interest in protecting the nation's safety from the very real and growing terrorist threat." H.R. Rep. No. 383, 104th Cong., 1st Sess. 45 (1995); see AEDPA § 301(a)(1), 110 Stat. 1247. Accordingly, Section 302 of AEDPA authorized the Secretary of State to designate an entity as a "foreign terrorist organization" (FTO) if she found that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1). Designations under AEDPA lasted for two years and could then be renewed by the Secretary. 8 U.S.C. 1189(a)(4).[1]

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[1] The criteria for FTO designation were amended by the USA PATRIOT Act of 2001. See Pub. L. No. 107-56, § 411(c), 115 Stat. 349. The provisions governing the length of time for which the Secretary's designations remain in effect, as well as how they can be challenged, were amended in 2004. See 9/11 Commission Implementation Act of 2004, Pub. L. No. 108-458, § 7119(a), 118 Stat. 3801 (8 U.S.C. 1189(a)(4) (Supp. IV 2004)). The changes to the statutory scheme effected by those amendments do not affect this case. Because the designations relevant to petitioners' indictment were made under AEDPA in its original form, this brief describes the statutory scheme as it then existed.

Designation of a group as an FTO brings three legal consequences. First, United States financial institutions possessing or controlling any funds in which the FTO or its agent has an interest are required to block all financial transactions involving those funds. 18 U.S.C. 2339B(a)(2). Second, representatives and members of designated organizations are inadmissible to this country and are ineligible for visas. 8 U.S.C. 1182(a)(3)(B)(i)(IV) and (V). Third, and of particular relevance here, it is a felony for any person within the United States or subject to its jurisdiction to "knowingly" provide "material support or resources" to any designated FTO. 18 U.S.C. 2339B(a)(1).

AEDPA established a specific mechanism for judicial review of the Secretary's designations. "Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit." 8 U.S.C. 1189(b)(1). If a designation or redesignation by the Secretary has become effective, however, a defendant in a criminal case who is charged with providing material support to an FTO "shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing." 8 U.S.C. 1189(a)(8). AEDPA thus authorized judicial review of the Secretary's designations only at the behest of the designated organization and only in the District of Columbia Circuit.

2. In both 1997 and 1999, the Secretary designated the Mujahedin-e Khalq (MEK) as an FTO. Pet. App. 16a-17a. Although the MEK challenged each designation in the District of Columbia Circuit, see *id.* at 17a, it

did not contest the Secretary's determination that it had carried out many of the attacks found by the Secretary to constitute "terrorist activity" within the meaning of 8 U.S.C. 1182(a)(3)(B). To the contrary, "the MEK submitted evidence showing that it was responsible for numerous assassinations of Iranian officials and mortar attacks on Iranian government installations." Pet. App. 18a; see *id.* at 24a (noting that the MEK has "proudly proclaimed its own terrorist activities"); *People's Mojahedin Org. of Iran* v. *Department of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (*People's Mojahedin II*).

a. The MEK sought judicial review of its 1997 designation by the Secretary as an FTO, and the District of Columbia Circuit upheld the designation. See *People's Mojahedin Org. of Iran* v. *Department of State*, 182 F.3d 17 (1999), cert. denied, 529 U.S. 1104 (2000) (*People's Mojahedin I*). The court held that, as a foreign organization without a presence in the United States, the MEK could not claim rights under the United States Constitution. *Id.* at 22. With respect to the statutory criteria for designation as an FTO, the court noted that the MEK had not disputed its status as a foreign organization. *Id.* at 24. The court concluded that any one of the numerous bombings and killings set forth in the administrative record was sufficient to establish the reasonableness of the Secretary's determination that the MEK had engaged in terrorist activity. *Id.* at 20, 24-25. The court further held that the determination whether the MEK's terrorist activity posed a threat to national security or the security of U.S. nationals was committed to the Secretary of State and was not subject to judicial review. *Id.* at 23.

b. In 1999, the Secretary redesignated the MEK as an FTO. At that time, the Secretary added a new alias

designation for the MEK, finding that the National Council of Resistance of Iran (NCRI) had been acting as the MEK's alter ego. The MEK and the NCRI challenged their 1999 designations. See *National Council of Resistance of Iran* v. *Department of State*, 251 F.3d 192 (D.C. Cir. 2001) (*NCRI I*). The District of Columbia Circuit rejected the MEK's statutory challenges to the Secretary's action. *Id.* at 199-200. The court held, however, that the NCRI had a sufficient presence in the United States to trigger the protections of the United States Constitution, *id.* at 201-203, and that the organization had not been provided with adequate procedural safeguards in connection with the 1999 designation, *id.* at 208-209.

c. The District of Columbia Circuit remanded the matter to the Secretary of State to provide appropriate process to the MEK and the NCRI. 251 F.3d at 209. In light of the foreign policy and national security concerns at stake, and the fact that the 1999 designation would shortly expire in any event, the court expressly declined to "order the vacation of the existing designations." *Ibid.* Shortly thereafter, the 1999 MEK/NCRI designation was replaced by a new FTO designation premised on a new administrative record. See 66 Fed. Reg. 51,088-51,089 (2001).

On remand, the Department of State reviewed the 1999 designation and afforded the MEK the process required by the District of Columbia Circuit's prior opinion. Again, the MEK did not dispute its foreign status, nor did it deny that it had carried out violent and deadly attacks within Iran. The Secretary accordingly declined to vacate the 1999 designation of the MEK as an FTO. The MEK and NCRI then sought judicial review both of that determination and of the new 2001 designation, and

the District of Columbia Circuit upheld the government's actions. See *People's Mojahedin II*, 327 F.3d at 1241-1245; *National Council of Resistance of Iran* v. *Department of State*, 373 F.3d 152, 156-160 (D.C. Cir. 2004) (Roberts, J.) (*NCRI II*).

The designation of the MEK has thus remained in effect, notwithstanding the MEK's repeated invocation of AEDPA's judicial-review provision, throughout the period relevant to this case. The Secretary designated the MEK as an FTO in 1997 and 1999; the MEK challenged both designations; the District of Columbia Circuit affirmed the 1997 designation; the court found that the process used for the 1999 designation was flawed, and it remanded the matter to the Secretary, but the court did not vacate the designation; the Secretary reaffirmed the 1999 MEK designation on remand; and the court rejected the MEK's renewed post-remand challenge to that 1999 designation.

3. On March 13, 2001, petitioners were charged in a 59-count indictment with knowingly providing material support or resources to the MEK, in violation of 18 U.S.C. 2339B(a)(1). Pet. App. 16a, 37a. Some of the charges in the indictment were predicated upon the 1997 designation of the MEK by the Secretary, others were based on the 1999 designation, and a conspiracy count depended on both. C.A. E.R. 2-16. The indictment alleged that, between October 1997 and February 2001, petitioners had undertaken a variety of measures to provide financial support to the MEK. Pet. App. 16a, 37a. The indictment further alleged that petitioners had engaged in those activities despite their awareness that the MEK had been designated as an FTO. *Id.* at 16a. For example, the indictment alleged that petitioners "were told during a telephone conference call with an

MEK leader in October 1997 that the MEK had been designated [as an FTO] by the State Department." *Id.* at 26a-27a.

4. On June 21, 2002, the district court granted petitioners' motion to dismiss the indictment, finding the relevant AEDPA provisions unconstitutional. Pet. App. 36a-59a. The court appeared to recognize that the question whether the MEK possessed the substantive characteristics of an FTO was not before it in this case. See *id.* at 45a-46a. The court held, however, that petitioners could raise the asserted unconstitutionality of 8 U.S.C. 1189's designation procedures as a defense to the criminal charges. Pet. App. 48a-51a.

The government argued that review of the underlying designations was barred by 8 U.S.C. 1189(a)(8), which states that "[i]f a designation under this subsection has become effective * * *, a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing." See Pet. App. 50a & n.11. The district court rejected that contention, stating that "Section 1189(a)(8) is an impermissible limitation on the federal courts' jurisdiction to hear constitutional challenges to the sufficiency of an indictment." *Id.* at 51a. The court found that "Section 1189 violates the [petitioners'] due process rights because [petitioners], upon a successful Section [2339B] prosecution, are deprived of their liberty based on an unconstitutional designation they could never challenge." *Ibid.*

The district court concluded that Section 1189 is unconstitutional on its face because "the express language of Section 1189 denies a designated organization the opportunity to be heard in a meaningful manner." Pet.

App. 52a. The court stated that "Section 1189, by its express terms, provides the designated organization with no notice and no opportunity to object to the administrative record or supplement it with information to contradict the designation." *Id.* at 53a. The court held on that basis that "a designation pursuant to Section 1189 is a nullity since it is the product of an unconstitutional statute. When a statute is found to be violative of the Constitution, any action taken thereunder, i.e., a designation of a status authorized by such statute, must likewise fail." *Id.* at 58a. The district court concluded that "the MEK's designation, having been obtained in violation of the Constitution, is a nullity and cannot serve as a predicate in a prosecution for violation of [18 U.S.C.] 2339B." *Id.* at 59a. The court dismissed the indictment in its entirety, including those counts that were predicated solely on the 1997 MEK designation, which had been upheld by the District of Columbia Circuit. *Id.* at 59a & n.17.

5. The court of appeals reversed. Pet. App. 15a-35a.

a. The court of appeals held that Congress had acted constitutionally in vesting judicial review of the Secretary of State's FTO designations exclusively in the District of Columbia Circuit. Pet. App. 20a-21a. The court observed that "[m]any administrative determinations are reviewable only by petition to the correct circuit court, bypassing the district court, and that procedure has generally been accepted." *Id.* at 20a. The court also held that 8 U.S.C. 1189(a)(8), which precludes the defendant in a prosecution under 18 U.S.C. 2339B from collaterally attacking the FTO designation on which the prosecution is based, is consistent with the Due Process Clause. See Pet. App. 21a-22a. The court explained:

> Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of United States Attorneys and juries. Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.

Id. at 22a.

The court of appeals also rejected petitioners' contention that their due process rights had been violated when the District of Columbia Circuit declined to set aside the 1999 designation of the MEK even after finding that the procedures used in connection with that designation were constitutionally infirm. Pet. App. 22a-30a. The court observed that "the designation would have been unobjectionable if, as it initially appeared, the MEK was located entirely abroad and had no American location, and [the designation] was, in any event, harmless because the MEK proudly proclaimed its own terrorist activities." *Id.* at 24a. The court further explained that the MEK itself was entitled to challenge the Secretary's designations in the District of Columbia Circuit and had obtained judicial review of both the 1997 and 1999 designations. *Id.* at 25a. The court of appeals concluded that petitioners could not establish a deprivation of their rights under the Due Process Clause by attacking "a designation that withstood judicial review, that we have no authority to review, that [petitioners] knew was in place throughout the period of the indict-

ment, and that is supported by the MEK's own submission." *Id.* at 27a.

The court of appeals further held that, because the MEK had the opportunity to challenge the FTO designations on which the instant prosecution was premised, the Due Process Clause did "not require another review of the predicate by the court adjudicating the instant § 2339B criminal proceeding." Pet App. 28a. The court noted that its holding was consistent with *United States* v. *Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc), vacated and remanded on other grounds, 543 U.S. 1097 (2005), the only other court of appeals decision that had addressed the issue. Pet. App. 29a & n. 51. The court explained that the Fourth Circuit in *Hammoud* had "held that a defendant's inability to challenge the designation was not a violation of his constitutional rights, since the *validity* of the designation is not an element of the crime. Rather, the element is the *fact* of an organization's designation as a 'foreign terrorist organization.'" *Id.* at 29a-30a (footnote omitted).

b. Relying on *McKinney* v. *Alabama*, 424 U.S. 669 (1976), petitioners argued that the defendant in a Section 2339B prosecution has a First Amendment right to attack the validity of the predicate FTO designation. See Pet. App. 30a. The defendant in *McKinney* was a newsstand proprietor who was convicted for selling a magazine that had been found to be obscene in a prior in rem proceeding to which the defendant was not a party. *Id.* at 31a. This Court "held that a decision in another proceeding could not conclusively determine First Amendment rights to sell a magazine of persons who had no notice and opportunity to be heard in that proceeding." *Ibid* In this case, petitioners contended that

they were similarly "entitled to litigate the terrorism designation of the MEK in their criminal case." *Ibid.*

The court of appeals rejected petitioners' First Amendment claim. Pet. App. 30a-35a. The court explained that "[t]he magazine in *McKinney* was speech, the money sent to the MEK is not. Though contributions of money given to fund speech receive some First Amendment protection, it does not follow that all contributions of money are entitled to protection as though they were speech." *Id.* at 31a (footnote omitted). Relying in part on *Regan* v. *Wald*, 468 U.S. 222, 242 (1984), the court found that "[t]he deference due the Executive Branch in the area of national security reinforces our conclusion that furnishing material assistance to foreign terrorist organizations must be distinguished from the *McKinney* issue, furnishing obscene magazines." Pet. App. 33a. The court concluded that "[t]he federal government clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities. We must allow the political branches wide latitude in selecting the means to bring about the desired goal of preventing the United States from being used as a base for terrorist fundraising." *Id.* at 34a (citations, brackets, internal quotation marks, and footnote omitted).

c. The court of appeals denied rehearing en banc, with five judges dissenting. Pet. App. 1a-14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the case is in an interlocutory posture, such that further proceedings on remand may moot the constitutional claims presented here. Further review is not warranted.

1. Petitioners have not been tried for the offenses alleged in the indictment, and the court of appeals' decision does not resolve the merits of the criminal charges. Rather, the court of appeals simply reversed the dismissal of petitioners' indictment, thereby allowing the prosecution to go forward. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). If petitioners are acquitted following a trial on the merits, their constitutional claims will become moot. If petitioners are convicted, they will be entitled to reassert their current challenges to the AEDPA provisions on which the prosecution is based, in addition to any other claims they may have at that time.

2. Relying primarily on *McKinney* v. *Alabama*, 424 U.S. 669 (1976), petitioners contend (Pet. 13-21) that they are entitled under the First Amendment to have the judge or jury determine in their own criminal case whether the MEK is indeed a terrorist organization. As noted above, this Court held in *McKinney* that a newsstand proprietor charged with distributing obscene materials was entitled to litigate the question whether the relevant magazine was in fact obscene, and that the defendant could not be bound by a determination made in a prior proceeding in which he had no opportunity to participate. See 424 U.S. at 670-677. As the court of appeals correctly held (Pet. App. 30a-35a), petitioners' reliance on *McKinney* is misplaced because the transfer

of funds to a foreign organization is not comparable for First Amendment purposes to the dissemination of magazines within this country.

a. This Court has recognized that Congress and the Executive have broad authority to regulate financial interactions between United States nationals and foreign entities. In *Regan* v. *Wald*, 468 U.S. 222 (1984), for example, this Court sustained a broad Executive Branch embargo on dealings with Cuba, including travel and financial transactions with Cuban nationals. The Court rejected the plaintiffs' Due Process Clause challenge to the embargo, deferring to the Executive Branch's determination that Cuba should be denied hard currency, in part because of that nation's prior support for violence and terrorism. See *id.* at 240-243. The Court explained that the conduct of foreign relations is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 242 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).

Petitioners contend that *Wald* is inapposite because the Court in that case "not[ed] that no First Amendment rights were at issue." Pet. 19 n.11 (citing *Wald*, 468 U.S. at 241-242). That effort to distinguish *Wald* is unavailing. The Court in *Wald* distinguished the nearly categorical travel ban that was at issue in that case from prior travel restrictions based on political affiliation, which the Court had struck down in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). See *Wald*, 468 U.S. at 240-242. The Court found that broadly applicable travel bans like that involved in *Wald* did not implicate "First Amendment rights of the sort that controlled in *Kent* and *Aptheker*." *Id.* at 241; see *id.* at 241-242. AEDPA's ban on financial

transactions with designated FTOs does not turn on the political affiliation or political motivation of the would-be donor but applies across the board. For First Amendment purposes, it is therefore far more analogous to the travel ban that was sustained in *Wald* than to the selective restrictions that were struck down in *Kent* and *Aptheker*.

b. Pertinent lower court decisions have similarly recognized the broad authority of the political Branches to regulate financial transactions between United States nationals and foreign entities. In *Freedom to Travel Campaign* v. *Newcomb*, 82 F.3d 1431 (9th Cir. 1996), the court of appeals rejected the plaintiff's substantive due process challenge to restrictions on travel to Cuba. *Id.* at 1438-1439. The court explained that the travel ban serves "to restrict the flow of hard currency into Cuba," and it noted the "history of judicial deference" to the decisions of the political Branches in the realm of foreign affairs. *Id.* at 1439 (citing, inter alia, *Wald*). Similarly, in *Farrakhan* v. *Reagan*, 669 F. Supp. 506 (D.D.C. 1987), aff'd, 851 F.2d 1500 (D.C. Cir. 1988) (Table), the district court rejected a Free Exercise Clause challenge to the President's economic sanctions program against Libya. *Id.* at 512. The court explained that it had "little choice but to defer to the judgment of the President that all economic intercourse with Libya should cease." *Ibid.*

Petitioners cite no decision in which any court has sustained a First Amendment challenge to federal restrictions on transfers of money to foreign entities. Only one other court of appeals has addressed a constitutional challenge to 8 U.S.C. 1189(a)(8), which bars the defendant in a criminal prosecution from collaterally attacking an FTO designation. See *United States* v. *Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc), va-

cated and remanded on other grounds, 543 U.S. 1097 (2005). The court in *Hammoud*, noting that "an FTO designation is subject to judicial review" at the behest of the organization itself, rejected the defendant's constitutional claim. *Ibid.*[2] Because petitioners' First Amendment claim is unsupported by precedent and is inconsistent with established principles of judicial restraint in the field of foreign relations, further review is not warranted.

c. Petitioners' reliance on *McKinney* is therefore unavailing. The ruling in *McKinney* created no risk of interference with the judgments of the political Branches in the realm of foreign affairs. *McKinney*, moreover, involved restrictions on the dissemination of magazines within this country, a form of regulation that implicates the First Amendment far more directly than does a prohibition on financial dealings with discrete foreign entities.[3] As the court of appeals explained,

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[2] The defendant in *Hammoud* did not raise a First Amendment claim but instead argued that Section 1189(a)(8) violated his right to jury trial and was inconsistent with nondelegation principles. See 381 F.3d at 331. This Court vacated the Fourth Circuit's judgment in *Hammoud* and remanded the case for further consideration in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See *Hammoud* v. *United States*, 543 U.S. 1097 (2005). The full Fourth Circuit subsequently reinstated those aspects of its earlier decision that involved matters other than sentencing. See *United States* v. *Hammoud*, 405 F.3d 1034 (2005).

[3] Petitioners' reliance (Pet. 18) on *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), and *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992), is similarly misplaced. Those decisions simply recognized that the oral or written solicitation of otherwise lawful contributions "is a form of speech protected under the First Amendment." *Id.* at 677; see *Heffron*, 452 U.S. at 647. The Court had no occasion to consider the constitutionality of any restriction on the transfer of funds, and the cases did not implicate the authority of federal officials to conduct this

"[t]hough contributions of money given to fund speech receive some first Amendment protection, it does not follow that all contributions of money are entitled to protection as though they were speech." Pet. App. 31a (footnote omitted). And because determinations of obscenity are based on the standards of the local community, see *Miller* v. *California*, 413 U.S. 15, 24 (1973); *McKinney*, 424 U.S. at 673, relitigation of the obscenity question in individual criminal prosecutions did not threaten any interest in nationwide uniformity of the sort implicated by this case.[4]

Furthermore, whereas the offense at issue in *McKinney* turned on whether the defendant had sold a magazine that was in fact obscene, the offense in this case turns on whether the defendant knowingly gave money to an entity that was *designated* as an FTO. A defendant in a Section 2339B prosecution is free to challenge the fact of the designation—which is the pertinent

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Nation's foreign affairs. In both of those cases, moreover, the challenged solicitation restrictions were upheld against First Amendment attack. See *Heffron*, 452 U.S. at 654-655; *Lee*, 505 U.S. at 679-685.

[4] As the Fourth Circuit noted in *Hammoud*, the Secretary of State's designation of a group as an FTO is subject to judicial review at the behest of the organization itself. See 381 F.3d at 331. Congress's decision to centralize such review in the District of Columbia Circuit, and to restrict the timing and scope of that review, furthers compelling purposes. Those purposes would be substantially disserved if judges or juries in individual criminal prosecutions could reach potentially conflicting judgments regarding the validity of a particular FTO designation, especially if that decision had already been reviewed and upheld by the District of Columbia Circuit. Cf. *United States* v. *Bozarov*, 974 F.2d 1037, 1044 (9th Cir. 1992) ("[T]he need for uniformity in the realm of foreign policy is particularly acute; it would be politically disastrous if the Second Circuit permitted the export of computer equipment and the Ninth Circuit concluded that such exports were not authorized by the [statute]."), cert. denied, 507 U.S. 917 (1993).

element of the offense. See Pet. App. 26a ("[T]he *fact* of an organization's designation as [a terrorist organization] is an element of § 2339B, but the *validity* of the designation is not.") (quoting *Hammoud*, 381 F.3d at 331). In addition, a defendant may contend that he did not act "knowingly" within the meaning of the statute. See 18 U.S.C. 2339B(a)(1) (Supp. IV 2004) ("To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization * * *, that the organization has engaged or engages in terrorist activity * * *, or that the organization has engaged or engages in terrorism.").

3. Petitioners contend (Pet. 21-28) that, even if defendants in Section 2339B prosecutions could otherwise be foreclosed from contesting the validity of the underlying FTO designations, that preclusion rule is impermissible here because the AEDPA designation procedures were themselves unconstitutional. Petitioners rely principally on this Court's decision in *Freedman* v. *Maryland*, 380 U.S. 51 (1965). That argument lacks merit and does not warrant this Court's review.

a. The defendant in *Freedman* was convicted of exhibiting a film without the prior approval of a state censorship board. See 380 U.S. at 52-53. This Court held that the state procedural regime governing authorization to exhibit motion pictures was constitutionally infirm. See *id.* at 59-60. Like *McKinney*, *Freedman* involved core First Amendment activity occurring within this country rather than the transfer of funds to a foreign entity. And, like *McKinney*, *Freedman* did not implicate the power of Congress and the Executive Branch to direct this Nation's foreign affairs.

In light of those differences alone, the decision in *Freedman* casts no meaningful light on the question

presented here. In particular, *Freedman* does not support petitioners' contention that they are constitutionally entitled to contest the validity of the underlying FTO designations in defending against the current criminal charges. As the Fourth Circuit has explained, "Congress has provided that the *fact* of an organization's designation as an FTO is an element of [the offense under 18 U.S.C.] § 2339B, but the *validity* of the designation is not." *Hammoud*, 381 F.3d at 331; see Pet. App. 22a ("Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not."). *Freedman* simply does not speak to the question whether Congress may define as a criminal offense the provision of money to an organization that has in fact been designated as an FTO, without regard to the validity of the designation.

b. Petitioners' claim of a constitutional right to attack the validity of the 1997 and 1999 designations is especially misguided because the MEK itself possessed and invoked the right to judicial review in the District of Columbia Circuit. In *People's Mojahedin Organization of Iran* v. *Department of State*, 182 F.3d 17 (1999), cert. denied, 529 U.S. 1104 (2000), the District of Columbia Circuit upheld the Secretary of State's 1997 designation of the MEK as an FTO. With respect to the procedures used to effect the designation, the court held that, as a foreign organization without a presence in the United States, the MEK could not claim rights under the United States Constitution. See *id.* at 22 ("No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a

change in policy."); see also *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-96 (D.C. Cir. 2002) (holding that foreign states are not covered by the Due Process Clause). That holding will encompass the large majority of designated FTOs. Cf. *32 County Sovereignty Comm.* v. *Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). And because the indictment in this case was premised in part on conduct alleged to have occurred during the period when the 1997 designation was in effect, that holding provides an independently sufficient basis for rejecting petitioners' contention that they are entitled to dismissal of the indictment.

In *NCRI I*, *supra*, the District of Columbia Circuit held that the 1999 designation of the MEK/NCRI violated the organization's rights under the Due Process Clause. 251 F.3d at 201-204; see p. 5, *supra*. In remanding the matter to the Secretary of State, however, the court expressly declined to "order the vacation of the existing designations." *Id*. at 209. After providing the MEK with additional process on remand, the Secretary again designated the MEK as an FTO and declined to vacate the 1999 designation, and the District of Columbia Circuit sustained the government's actions. See *People's Mojahedin II*, 327 F.3d at 1241-1245; *NCRI II*, 373 F.3d at 156-160.

Thus, "the MEK has been designated a terrorist organization throughout the relevant period, and that designation has never been set aside." Pet. App. 26a. And, as the court of appeals recognized in this case, any errors in the process that produced the 1999 designation were ultimately "harmless because the MEK proudly proclaimed its own terrorist activities." *Id*. at 24a. Under those circumstances, it is particularly clear that petitioners have suffered no deprivation of constitutional

rights as a result of their inability to challenge the designations that underlay this prosecution.

c. The question whether a prosecution under 18 U.S.C. 2339B (2000 & Supp. IV 2004) may be premised on an FTO designation that was held to be procedurally invalid but was never vacated is unlikely to arise in the future. In accordance with the District of Columbia Circuit's decision in *NCRI I*, the Secretary of State currently affords the process that decision requires before designating as an FTO an organization with a significant United States presence. See, *e.g.*, *Kahane Chai* v. *Department of State*, 466 F.3d 125, 127 (D.C. Cir. 2006). Thus, to the extent that petitioners' constitutional claim rests on the fact that the 1999 designation was held to be procedurally invalid in a manner that the District of Columbia Circuit ultimately found to be harmless, the question presented is of no ongoing importance and therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-241

IN THE

Supreme Court of the United States

ROYA RAHMANI, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

As elucidated by Judge Kozinski's dissent from the denial of en banc review, the Ninth Circuit has decided a critical First Amendment issue in direct conflict with longstanding Supreme Court precedent. The *amicus* briefs filed by The Constitution Project and Congressmen Bob Filner and Tom Tancredo highlight the importance of the threat to the First Amendment posed by the Ninth Circuit's extraordinary holding that the government can criminalize expressive activity without providing for heightened procedural protections, or even affording a criminal defendant the right to argue that his or her expression was constitutionally protected.

The Government's perfunctory treatment of those critical issues – suggesting technical reasons why certiorari could be denied, repeating previously discredited arguments, and offering ill-reasoned ways to distinguish applicable Supreme Court precedent – shows that the Government has no real justification for the Ninth Circuit's defiance of controlling Supreme Court authority.

ARGUMENT

1. The fact that the Ninth Circuit's opinion was issued on a motion to dismiss has no bearing on its cert-worthiness.

The brief in opposition urges this Court to reject certiorari on the ground that this case is in an interlocutory posture and, if Petitioner Roya Rahmani and her six co-defendants are all acquitted, the issues raised by the certiorari petition could be rendered moot. Br. in Opp. 12.

But it is well established that when, as here, a petition for certiorari presents an important issue that is "fundamental to the further conduct of the case," its interlocutory posture poses no barrier to this Court's consideration. *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Thus, this Court quite often grants certiorari to review cases

in the identical posture as this one – where a federal court of appeals has reversed a district court's dismissal of a civil or criminal complaint. *See, e.g., Bates v. United States*, 522 U.S. 23, 28-29 (1997); *Solorio v. United States*, 483 U.S. 435, 437-38 (1987); *Estelle v. Gamble*, 429 U.S. 97, 98 (1976); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

Those criteria are certainly met here. The Government does not dispute the importance of this case; nor could it. The decision below is a published Ninth Circuit opinion that will govern future prosecutions brought under 18 U.S.C. §2339B as well as other cases with important First Amendment implications, regardless of what happens to Petitioners on remand.

Review is critical so that the Ninth Circuit decision, which as Judge Kozinski warned, "runs contrary to two of our defining traditions – that of free and open expression, and that of justice and fair play," Pet. App. 3a, does not wreak havoc on constitutional liberties. *Compare Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 471 (1977) (reviewing lower court's denial of motion to dismiss because of importance of issue involved).[1] *Amici* point out that the decision will work chilling effects on legitimate political expression, particularly when organizations may be falsely designated terrorist for political reasons. *Amicus* Br., Congressmen Filner and Tancredo 6-7. And they highlight that the significance of the Ninth Circuit opinion goes beyond its implications under §2339B, for its logic would permit the government, by fiat, under the guise of fighting terrorism, to take actions including criminalizing published works deemed national security threats. *See Amicus* Br., The Const. Proj. 10, 15.

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[1] By contrast, in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), upon which the Solicitor General relies, the petitioner had previously argued that the case "involved no question of public interest and general importance . . . ." *Id.* at 258.

Further, the Ninth Circuit decision is fundamental to the further conduct of this case, and poses immediate consequences for the seven petitioners: They will be forced to undergo a criminal trial, facing penalties of up to ten years of imprisonment per count, deprived of perhaps their strongest defense. In such cases, certiorari is warranted even when the case is in an interlocutory posture. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

By contrast, no greater judicial efficiency will result from postponing review. Unless all seven Petitioners are acquitted of all charges (a prospect rendered somewhat unlikely by the Ninth Circuit's preclusion of perhaps their strongest defense, but which, in any event, would leave the Ninth Circuit's published opinion intact), future proceedings in this case will not in any way affect the review of the questions presented. Because the First Amendment defense is barred, no further factual development will take place. And the law of the case doctrine will prevent Petitioners from further argument on the legal issues. No further efficiency will derive from consolidating judicial consideration of this issue with that of other appellate issues raised after trial. *Compare Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

For these reasons, it makes no sense to postpone review and thereby to allow the Ninth Circuit decision to stand as binding precedent while Petitioners go through proceedings that will shed no additional light on the questions presented.

2. The Government inexplicably mischaracterizes the statute at issue in *McKinney* in a futile attempt to distinguish that case.

In what may be seen as an implicit concession that *McKinney* is otherwise not distinguishable, the brief in opposition asserts that the element of the offense at issue in *McKinney* was that the material "was in fact obscene," *not* whether it had been previously designated as obscene. Br. in

Opp. 16. That argument is blatantly false, as has previously been pointed out in this case.

In *McKinney*, the defendant was charged with "selling 'mailable matter known . . . to have been judicially found to be obscene.'" *McKinney v. Alabama*, 424 U.S. 669, 672-73 (1976) (ellipses in original). The Alabama statute did the same thing as Section 2339B—it prohibited the sale of material "judicially found" to be unprotected by the First Amendment (in that case, obscene; in this case, terrorist).[2]

The original Ninth Circuit opinion in this case, like the brief in opposition, erroneously stated that the element of the crime at issue in *McKinney* was that the material sold was in fact "obscene." *United States v. Afshari*, 392 F.3d 1031, 1039 (9th Cir. 2004), *opinion withdrawn and superseded*, 412 F.3d 1071, *on rehearing*, 426 F.3d 1150 (2005). The Petition for Rehearing pointed out that the panel was mistaken. The subsequent Ninth Circuit opinions did not rely on this false distinction; nor did the Government ever advance this clearly erroneous argument in the lower courts. Thus, the revival of this discredited argument as a purported distinction, despite the Government's knowledge that it is erroneous, suggests that all parties understand that *McKinney* is on all fours with this case.[3]

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[2] In *McKinney*, the designation had to be "judicial," while here the statutory predicate for a criminal prosecution is simply an administrative determination. *See* 8 U.S.C. § 1189(a)(1) (2000); 18 U.S.C. §2339B(a)(1) (2000).

[3] It is also worth noting that (then) Justice Rehnquist's reasoning in *McKinney* did not depend on the obscenity test's incorporation of local community standards. In fact, the prior determination at issue in *McKinney* had been made in Alabama, where the criminal prosecution was also brought. 424 U.S. at 671-73.

3. No authority provides that the executive branch's discretion over foreign policy overrides the First Amendment protections mandated by *McKinney* and *Freedman*.

In arguing that courts must defer to the executive's foreign policy determinations, the brief in opposition relies on cases involving substantive due process challenges to travel restrictions, Br. in Opp. 13-14, even though those decisions make it clear that no First Amendment right was implicated and that the analysis would otherwise have been different. *See Regan v. Wald*, 468 U.S. 222, 241-42 (1984); *see also Zemel v. Rusk*, 381 U.S. 1, 16 (1965). In fact, those Supreme Court decisions highlight that, when First Amendment rights are implicated by a travel restriction, this Court does not blindly defer to the Government's claim that a restriction is necessary for national security. *See Aptheker v. Secretary of State*, 378 U.S. 500, 509, 514 (1964).[4]

The Government asserts that the material support law at issue in this case is more like the categorical travel ban upheld in *Regan* than the travel restriction based on political affiliation struck down in *Aptheker*. Br. in Opp. 13-14. But the reason that it mattered in those cases whether the travel restriction was categorical or viewpoint-based is because there is no First Amendment right to travel. Only if the travel restriction is based on political affiliation is the First Amendment implicated. *See Regan*, 468 U.S. at 241-42; *Zemel*, 381 U.S. at 16-17. Here, by contrast, there *is* a First Amendment right to contribute to political groups, which is violated by a conviction for contributing to a political

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[4] This Court has more recently had occasion, in cases including *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), and *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), to reaffirm that claims of national security do not shield the Government's decisions from scrutiny when individual liberties are at stake.

organization erroneously designated as terrorist regardless of the reason for that designation.

As *amici* explain, the Ninth Circuit's holding that a person may be criminally prosecuted without the opportunity to show his activity was constitutionally protected is unprecedented, particularly in the First Amendment context, and allowing it to stand would contravene this country's traditions and undermine the rule of law. *Amicus* Br., Const. Proj. 11-13 & n.3.[5]

4. Core First Amendment activity is at issue here.

Notably, the Government does not defend the Ninth Circuit's circular and conclusory reasoning that there is no First Amendment right to contribute to a terrorist organization (just as, of course, there is no right to publish material that is

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[5] The brief in opposition's reliance on a lower court case, *United States v. Borazov*, 974 F.2d 1037, 1044 (9th Cir. 1992), is misplaced. *Borazov* involved no First Amendment issue, and its rejection of a nondelegation challenge to the Secretary of Commerce's export authority was premised on its conclusion that courts *do* have the authority to review colorable constitutional challenges to the Secretary's actions. 974 F.2d at 1038, 1044-45.

Nor does *Borazov* evidence an "interest in nationwide uniformity of the sort implicated by this case." Br. in Opp. 16. *Borazov* involved the prospect of contrary legal rulings by federal courts of appeals. In this case, by contrast, a jury acquittal would render no legal ruling and have no preclusive effect whatsoever. *See* Cert. Petn. 20-21. As *amici* point out, similar jury determinations are made in espionage and other prosecutions as a matter of course. *Amicus* Br., Const. Proj. 10, 16.

Moreover, the Government's purported interest in nationwide uniformity is belied by the statute's failure to prohibit defendants in civil injunction cases from challenging an organization's designation, *see* 18 U.S.C. §2339B(c) (2001); 8 U.S.C. §1189(a)(8) (2001), so that inconsistent determinations regarding the same organization are already possible. And if Congress is concerned about uniformity, it might amend the statute to designate a single venue for defendants in civil and criminal cases to assert their challenges.

actually obscene) or its misguided conclusion that monetary contributions are not constitutionally protected expressive activity. *See* Cert. Petn., App. 5a-6a, 31a-32a. However, the brief in opposition challenges the applicability of *McKinney* and *Freedman* on the ground that contributions to "foreign" organizations enjoy lesser constitutional protection than the "core" First Amendment activity of publishing potentially obscene material. *See* Br. in Opp. 15, 17.

But the determination that an organization is "foreign" says nothing about whether it engages in expressive activities in the United States (as, in fact, the PMOI does). More important, Petitioners have previously explained that contributions to foreign groups enjoy no less constitutional protection than those made to wholly domestic causes. Cert. Petn. 18-19. The Government cites no contrary authority.

The importance of the expressive activity at issue is well illustrated by the strong interest of Members of Congress in the right of individuals to contribute to the organization deemed terrorist in this case, as revealed both by Members' filing of an *amicus* brief, and by the signatures of hundreds of Members on letters asking that the designation be lifted. *See Amicus* Br., Congressmen Filner and Tancredo 9-11 & n.8, 12-13 & n.9, 16. It would be strange indeed if contributions to organizations that have attracted such congressional interest – or for that matter to groups like the African National Congress or partisans opposing the Nazis – were held to enjoy lesser constitutional status than sexually explicit material that is not quite obscene. The Government's argument turns on its head the actual order of constitutional magnitude of the expression at issue in *McKinney* and that at issue here. For "it is manifest that society's interest in protecting [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976) (Stevens, J., plurality opinion).

5. The Government confuses the heightened procedural protections required by *Freedman* before a prior restraint upon expression can be imposed with the minimal procedures mandated by the Due Process Clause.

The brief in opposition contends that the issues in this case are unlikely to arise again because the D.C. Circuit fixed any due process problems with the terrorist designation procedures. Br. in Opp. 20. But that argument is a red herring because Petitioners' *Freedman* argument does not depend on the D.C. Circuit's determination that the procedures used to designate the PMOI as terrorist in 1999 violated the Due Process Clause.

Freedman v. Maryland, 380 U.S. 51 (1965), is not a procedural due process case; it is a First Amendment case. In *Freedman*, this Court established that when the Government seeks to impose a prior restraint on potentially protected speech it must provide "adequate safeguards against undue inhibition of protected expression." 380 U.S. at 59. Those safeguards include requirements that the designation proceedings be adversarial, provide for effective and prompt judicial review, place the burden upon the Government to prove that the activity is unprotected, and permit the expression until judicial review has been completed. *Id.* at 58-59.

The minimal procedural protections that have been implemented in response to the D.C. Circuit's holding in cases involving organizations physically present in the United States (that is, notice of the proposed designation and the unclassified supporting items, and the opportunity to respond in written form, *see National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 196, 208-09 (D.C. Cir. 2001) ("*PMOI II*")), do not come close to fulfilling *Freedman*'s requirements.[6] Judge Kozinski's opinion identifies

[6] In the cases decided by the D.C. Circuit, the PMOI did not argue that the designation process imposed a prior restraint or that the First Amend-

numerous aspects of the terrorist designation procedure that violate *Freedman*'s mandate: The prohibition on monetary contributions takes effect immediately upon the Secretary's designation and remains in force while judicial review is pending. The burdens of proof and of instituting judicial review fall upon the organization. There is no assurance of prompt judicial determination. And the only "judicial review" available is cursory and far from the meaningful adversary proceedings that *Freedman* demands. Cert. Petn., App. 7a-9a & n.4.

Moreover, the Government acknowledges that even the limited *PMOI II* procedures are provided only when an organization has a constitutionally significant presence in the United States. Br. in Opp. 20. But a citizen's First Amendment right to contribute to a non-terrorist political organization is not derivative of the organization's constitutional rights. Nor does it depend on the organization's physical presence.[7]

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ment required heightened procedural protections. So the court had no occasion to address such an argument. Moreover, the D.C. Circuit cases did not involve a criminal prosecution. Thus, there was no consideration of whether a criminal defendant would be entitled personally to challenge the designation or to any other heightened protections.

[7] For this reason, the argument that *Freedman* has no applicability to conduct that took place when the 1997 designation was in effect (because the D.C. Circuit found that the MEK did not have a physical presence in the United States) is misguided. Br. in Opp. 19. The procedures used to make the 1997 designation provided no more procedural protections than those used in 1999, which were held to violate even the minimal requirements of the Due Process Clause. *See* Cert. Petn., App. 9a-10a n.5. (And contrary to the Government's suggestion, the designation entered in 1999 was never upheld by the D.C. Circuit; rather, the court upheld a retroactive designation entered on September 24, 2001, well *after* the acts charged in the indictment. *See People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003) ("*PMOI III*")).

If the Government is right about *McKinney*, then a criminal defendant has no right to defend himself on the ground that his donations were actually made to a non-terrorist organization and were therefore constitutionally protected. In that case, the *only* First Amendment protection provided to a person who wishes to engage in the expressive activity of making political donations would be those safeguards provided in the designation procedure itself. And the Government's rejection of the protections required by both *McKinney* and *Freedman* mean that expressive activity could be subjected to prior restraint and subsequent criminal prosecution with only minimal procedural safeguards or none at all.

The threat posed, as Judge Kozinski notes, by authorizing the executive branch "carte blanche to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it," Cert. Petn., App. 14a, is even more dramatic than that posed by the institutional bias of a censor whose "business is to censor," *Freedman*, 380 U.S. at 57. *Amici* call attention to the ever-present danger that the State Department will designate an organization as terrorist based on political considerations, either foreign or domestic, as substantial evidence suggests was done here. *Amicus* Br., Const. Proj. 18; *Amicus* Br., Congressmen Filner and Tancredo 7, 9-14. Thus, this case well illustrates why the First Amendment demands additional procedural protections beyond those mandated by the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States of America.

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to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CONGRESSMEN BOB FILNER AND TOM TANCREDO, ON BEHALF OF THE IRAN HUMAN RIGHTS AND DEMOCRACY CAUCUS OF THE U.S. HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*[1]

Amici Bob Filner and Tom Tancredo are members of the U.S. House of Representatives. Rep. Filner has represented California's fifty-first congressional district since 1992. Rep. Tancredo has represented Colorado's sixth congressional district since 1998. Like all members of Congress, both representatives share a strong interest in the proper interpretation and application of statutes enacted by Congress, as well as in the protection of the constitutional rights of all Americans.

Reps. Filner and Tancredo submit this brief not only as *amici curiae* in their own right, but also on behalf of the Iran Human Rights and Democracy Caucus of the U.S. House of Representatives, for which they currently serve as co-chairs.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, following a series of deadly terrorist attacks that collectively claimed the lives of 363 Americans. Intending the legislation to serve as a broad response to the threat posed by terrorism, Congress included in AEDPA a wide range of provisions ranging from new immigration rules to restrictions on the acquisition of biological and chemical weapons and plastic explosives to increased funding for law enforcement agencies. Congress regarded these measures as "the tools necessary to prevent and punish criminal terrorist enterprises" and, thus, as essential to combating the rising tide of terrorism. *See* H.R. Conf. Rep. No. 104-383, at 38 (1995).

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[1] No person other than the *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

Congress also enacted as part of AEDPA the "material support" provision at issue in this case. Designed to prohibit foreign terrorist organizations from raising money within the United States, the provision made it a federal crime, punishable by up to ten years[2] in prison, for Americans to provide "material support" – including the solicitation of financial contributions – to groups designated by the Secretary of State as "Foreign Terrorist Organizations" (FTOs). *See* Pub. L. No. 104-132, §§ 302(a), 303(a) (1996) (adding 8 U.S.C. § 1189 and 18 U.S.C. § 2339B).

2. The material support provision was one of several highly controversial portions of the Act which garnered considerable attention as a potential threat to protected civil liberties. In particular, Congress recognized that the material support provision could restrict the exercise of First Amendment rights. In response to these concerns, Congress made clear – and the executive branch agreed – that the Secretary of State should carry out the FTO designation process in a viewpoint-neutral and apolitical manner, and in strict accordance with the statutory criteria. Based on this understanding, and in light of the overwhelming importance of AEDPA generally in fighting terrorism, Congress passed the Act despite its misgivings regarding its possible impact on the exercise of constitutional rights.

3. The First Amendment does not protect an individual's right to donate money to actual terrorist organizations. As the petition for certiorari in this case demonstrates, however, serious First Amendment difficulties arise when the material support provision both prohibits a criminal defendant from demonstrating that an organization was improperly designated as a "foreign terrorist organization" and lacks even minimal procedural safeguards for challenging the designation

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[2] Congress subsequently amended the statute to make material support of an FTO punishable by up to fifteen years' imprisonment. The USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 810(d) (2001).

generally. *See McKinney v. Alabama*, 424 U.S. 669 (1976); *Freedman v. Maryland*, 380 U.S. 51 (1965). In the view of *amici*, these difficulties become even more disturbing when, contrary to Congress's intent, the designation process operates so that First Amendment rights are restricted under the material support provision not because the designated organization actually meets the statutory criteria for designation, but instead based on the viewpoints espoused by that organization and the vagaries of political expediency. Such selective designations strip individuals of their constitutionally protected right to support disfavored groups.

Petitioners' case presents precisely such a disturbing scenario. Although Congress made clear that the designation process was intended to be viewpoint neutral, the process in this case was instead driven by politics. The Mujahedin-e Khalq (MEK)[3] was thus designated as an FTO notwithstanding that – as members of Congress have repeatedly reiterated – the organization is a legitimate political opposition group that Americans should be able to freely and openly support.

ARGUMENT

I. Congress Intended, and the Executive Branch Agreed, That the FTO Designation Process Be Apolitical and Strictly Guided by the Statutory Criteria.

In enacting AEDPA, Congress debated at great length whether the legislation, and the material support provision in particular, stretched too far in restricting personal freedoms in the name of national security. In those debates, Congress

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[3] The MEK is also commonly known as the People's Mojahedin of Iran (PMOI). See Pet. for Cert. 6. It is a member of the umbrella coalition of the National Council of Resistance of Iran (NCRI). *See* Georgetown Univ. & Iran Pol'y Cmte., *Mujahidin-e Khalq Organization (MEK)*, *available at* www.ict.org.il/inter_ter/orgdet.cfm?orgid=24.

made clear that it intended FTO designations to be made by the Secretary of State in a viewpoint-neutral and apolitical manner. Anything short of that, Congress believed, would raise serious constitutional concerns, particularly with respect to First Amendment rights of free speech and association. In congressional hearings, however, the executive branch dismissed Congress's fear that the statute might be used for political ends as hypothetical and improbable. Thus assured, Congress passed the Act despite its serious concerns that improperly guided designations would unconstitutionally suppress free and open expression.

1. Prior to AEDPA's enactment, members of Congress on both sides of the aisle and in both Houses acknowledged that responding to terrorism "carries with it the grave risk of impinging on" civil liberties, including freedom of speech. 141 Cong. Rec. S7479-03, at *S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch). As such, they were concerned that some of AEDPA's antiterrorism measures might not "achieve an appropriate balance between our desire to take action against terrorist acts and our desire to protect the fundamental civil rights of all Americans." 142 Cong. Rec. E592-02, at *E592 (daily ed. Apr. 19, 1996) (statement of Rep. Stokes).

2. While strongly believing that "nothing in the Constitution provides the right to engage in violence against fellow citizens" or to "[finance] terrorist bombings," 141 Cong. Rec. S7479-03, at *S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch), members of Congress were especially concerned about the possibility that, as a result of AEDPA's extraordinarily broad definitions of "terrorist activity"[4] and "national security"[5] (which, as discussed *infra*

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[4] The term "terrorist activity" is defined as

> any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of

at 10-11 and 14, could encompass both groups that have renounced violence and groups with no alternative other than to resort to armed resistance), the material support provision would restrict the exercise of First Amendment rights, *see* 142 Cong. Rec. S3454-01, at *S3473 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) ("I am [] concerned about the first amendment implications of this provision, restricting the ability of US citizens to support favored causes.");

> the United States or any State) and which involves any of the following:
>
> (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
>
> (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.
>
> (IV) An assassination.
>
> (V) The use of any--
>
> (a) biological agent, chemical agent, or nuclear weapon or device, or
>
> (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii).

[5] The term "national security" is defined as "the national defense, foreign relations, or economic interests of the United States."

8 U.S.C. § 1189(c)(2) (as effective Sept. 30, 1996 to Oct. 20, 2001).

Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't, 104th Cong. (1995) (statement of Sen. Specter, Chairman, Senate Subcomm. on Terrorism, Tech., and Gov't) (addressing concern that material support provision might "violate the first amendment rights of Americans to support certain organizations that do not engage in criminal acts" in the U.S.). For example, pursuant to these definitions, an organization could be designated as an FTO based only on the use or even the *threatened* use of any explosive or firearm with intent "to cause substantial damage to property," 8 U.S.C. § 1182(a)(3)(B)(ii) (as effective Oct. 30, 2000 to Oct. 25, 2001),[6] contrary to the "economic interests of the United States," *id.* § 1189(c)(2) (as effective Sept. 30, 1996 to Oct. 20, 2001).[7]

First, Congress heard testimony warning that although the material support provisions were targeted at curbing fundraising by genuine terrorist organizations, AEDPA's broad definition of "terrorist activity" was likely to have a "chilling effect on humanitarian and philanthropic fundraising in the United States" generally, by prompting would-be donors to forgo contributions to legitimate organizations to avoid the prospect of criminal liability. *Comprehensive*

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[6] The current version of 8 U.S.C. § 1182(a)(3)(B)(iii) sweeps even more broadly. It would permit an organization to be designated as an FTO based on the threatened or attempted use of any "weapon or dangerous device," such as a knife or blunt object.

[7] Indeed, one commentator noted that because of AEDPA's broad definitions, the material support provision could encompass "tens of thousands of potential organizations, and hundreds of thousands of affiliated organizations and persons." *Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong. (1995) (statement of David Cole, Professor, Georgetown University Law Center).

Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't, 104th Cong. (1995) (statement of Khalil E. Jahshan, Executive Director, Nat'l Ass'n of Arab Americans); *see also* 142 Cong. Rec. H3605, at *H3614 (daily ed. Apr. 18, 1996) (statement of Rep. Jackson Lee) (noting that "false accusations against certain groups" would result in a "chilling effect" on First Amendment rights).

Second, and even more significantly, members of Congress were concerned that the combination of AEDPA's broad definition of "terrorist activity" and the discretion accorded to the executive branch in designating an organization as an FTO would exacerbate the First Amendment problems already inherent in the material support provision by opening up the designation process to manipulation for political purposes: "Given the bill's broad definition of 'terrorism,' as a practical matter this will give the Secretary of State completely open-ended authority to determine which organizations to blacklist. This could very well lead to the law being applied in a selective manner . . . ." H.R. Rep. No. 104-383, at *180 (1995) ("Dissenting Views"). They cautioned that this "unfettered executive power," *Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong. (1995) (statement of Sen. Specter, Chairman, Senate Subcomm. on Terrorism, Tech., and Gov't) (citing concern held by members of Congress), would allow the Department of State to single out disfavored political groups "based on the politics of the moment," DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 139 (3d ed. 2006).

3. To assuage its concerns that the material support provision might be used selectively to silence support for disfavored groups, Congress made clear that the designation

process was to be carried out in strict accordance with the statutory criteria, with no consideration paid to a group's political viewpoint. The House Report on the bill thus emphasized that the fundraising prohibition established by the material support provision "is not based upon the message or opinions espoused by a particular organization. Rather, the criminal prohibition is based on the documented illegal acts of that organization." H.R. Rep. No. 104-383, at *44 (1995). Moreover, Congress explained, the fundraising prohibition should be "applie[d] uniformly and equally to all persons within the United States, regardless of political, philosophical, or religious affiliation." *Id.* at *45. While acknowledging that it would be impractical to designate each and every group engaging in terrorist activities, Congress "anticipated that the Secretary of State [would] be . . . exhaustive in his or her designation of terrorist groups." *Id.* at *81.

4. For its part, the executive branch "acknowledge[d] . . . [the] legitimate concerns" raised by members of Congress regarding the constitutionality of the material support provision. *Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong. (1995) (statement of Teresa Roseborough, Deputy Asst. Att'y Gen., Dep't of Justice). It took pains, however, to dismiss such concerns as unfounded, noting observations by the provision's critics that the "First Amendment issues would be largely academic if it could be assumed that [material support provision] would be narrowly applied only against genuine terrorist organizations." *Id.* "In that respect," the Department of Justice continued, "the constitutional criticisms are primarily based upon hypothetical misapplications of the legislation rather than facial constitutional flaws." *Id.*

The executive branch thus made clear that it agreed with Congress's understanding of the material support provision and assured Congress that it would carry out the FTO designation process in a viewpoint-neutral and apolitical

manner. Specifically, it emphasized that the arguments against the material support provisions rested on the premise that the executive branch "would abuse [its] power to designate terrorist organizations in order to thwart First Amendment rights" – a premise that it rejected. *Id.*

5. Armed with these assurances from the executive branch that the designation process would be carried out in a viewpoint-neutral manner and in accordance with the statutory criteria, Congress enacted AEDPA despite its misgivings about the threat that the material support provisions posed to the civil liberties of law-abiding Americans. In so doing, it emphasized both that "the United States is a fertile ground for financial support for foreign terrorist organizations," 142 Cong. Rec. S3454-01, at *S3473 (daily ed. Apr. 17, 1996) (statement of Sen. Specter), such that the material support provision was necessary to cut off fundraising in the United States for genuine terrorist organizations, and that, "on balance," any misgivings about possible First Amendment concerns were outweighed by the "very, very important" contribution that AEDPA would make to the fight against terror. *Id.* at *S3470; *see also* 142 Cong. Rec. H2129-05 (daily ed. Mar. 13, 1996) (statement of Rep. Nadler) (agreeing with other members of Congress that the provision raised serious First Amendment concerns, but emphasizing that without such a provision, the U.S. would "have no prohibition that can be enforced against the funding from the United States of terrorist organizations").

II. Contrary to Congress's Intent, the Designation of the MEK Was Driven by Politics.

In 1997, the Department of State designated the MEK as an FTO. Because – as members of Congress have repeatedly reiterated – the MEK is "a legitimate opposition to the Iranian regime," *see* U.S. Congress, Statement on Iran's Deeds (Sept. 1998) (signed by 220 members of the House of Representatives), and because the designation process relied (as is widely acknowledged) on political expediency rather

than the statutory criteria, the designation was "in direct contradiction with the spirit of the [AEDPA] and congressional intent in drafting the law," *see* U.S. Congress, Iran Statement (Nov. 2002) (signed by 150 members of the House of Representatives).

1. The MEK is the primary opposition group in Iran, which is currently governed by a regime described by the U.S. as part of an "axis of evil" and one of the world's primary state sponsors of terror. Much of the criticism leveled at the MEK derives from its alleged attacks in the 1970s on U.S. security advisors to the Shah of Iran, whom the MEK regarded as corrupt and repressive and thus sought to unseat. The group is also frequently accused of having supported the takeover of the U.S. Embassy by Muslim students in 1979. Although the MEK has denied both sets of allegations, *see* IRAN POL'Y COMM., U.S. POLICY OPTIONS FOR IRAN 17-18 (2005), *reprinted in* 151 CONG. REC. E789-02, *E793 (daily ed. Apr. 27, 2005) (statement of Rep. Filner), it is undisputed that the MEK has not targeted U.S. interests in the years since 1979.

Although the MEK's detractors also criticize the group's past use of armed resistance against Iran, even the Department of State recognizes that the MEK, as Iran's leading political opposition group, has borne the brunt of Tehran's efforts to exterminate internal political dissent, *see* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, 1995 PATTERNS OF GLOBAL TERRORISM (1996), *available at* http://dosfan.lib.uic.edu/ERC/arms/PGT_report/ 1995PGT.html; indeed, Iran's security forces are believed to have executed as many as one hundred thousand MEK members and supporters, *see* U.S. Congress, Iran Statement (Nov. 2002) (signed by 150 members of Congress); *see also Council on Foreign Relations Panel, The Relationship Between the U.S. and Iran*, FED. NEWS SERV., Jan. 12, 2005 (statement of Mark Palmer, Capital Development Co.). Viewed in this context, the MEK's past use of armed resistance places the group in the company of

other resistance groups – such as the Northern Alliance in Taliban-controlled Afghanistan, the African National Congress (ANC) in apartheid-era South Africa, and Jewish armed resistance groups in Nazi-controlled Europe – that have had no other recourse but to use armed tactics as non-state parties to a conflict.

2. As has been widely recognized,[8] the Department of State capitalized on the MEK's controversial status and designated the organization as an FTO to further its political agenda. In May 1997, Iran elected Mohammad Khatami, a reform-minded political moderate, as President. The U.S. regarded the change in leadership as an opportunity to reopen dialogue with Iran. As the group that the Iranian regime viewed as its most serious internal threat, Robert Collier, *Exonerated in Terror Case, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1, the MEK was a natural pawn, and Iran reportedly demanded the designation as a prerequisite for engaging in diplomatic talks with the U.S., *see* James Morrison, *Embassy Row: Backing Resistance*, WASH. TIMES, July 27, 2006, at A14. In October 1997, the State Department complied with Iran's demand and included the MEK on a list of designated FTOs. Shortly thereafter, a senior Clinton administration official indicated that the designation was intended as a "goodwill gesture" to Khatami and the Iranian regime. Norman Kempster, *U.S. Designates*

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[8] *See, e.g.*, U.S. Congress, Statement on Iran's Deeds (Sept. 1998) (signed by 220 members of the House of Representatives); IRAN POL'Y COMM., U.S. POLICY OPTIONS FOR IRAN 17-18 (2005), *reprinted in* 151 CONG. REC. E789-02, *E793 (daily ed. Apr. 27, 2005) (statement of Rep. Filner); Robert Collier, *Exonerated in Terror Case, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1; Leanne Piggott, Editorial, *The Sensible Option on Iran*, THE AUSTRALIAN, Jan. 19, 2006, at 10; Parliamentary News, PRESS ASS'N NEWSFILE, Feb. 1, 2006 (citing Andrew Mackinlay, Member of the U.K. Parliament for Thurrock).

30 Groups as Terrorists, L.A. TIMES, Oct. 9, 1997, at A16. Former Clinton administration officials have subsequently confirmed that the designation was aimed at bolstering support for Khatami, who faced strong opposition from the religious old guard within Tehran. Robert Collier, *Exonerated in Terror Cases, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1.

3. That the designation of the MEK was and continues to be politically motivated is further confirmed by the Secretary of State's failure to revoke the designation despite increasingly clear evidence that there is no basis for it. In 2001, the MEK explicitly renounced the use of violence and has not engaged in attacks in Iran or elsewhere since – a fact that even the State Department's Country Reports on Terrorism, which purportedly serve as the unclassified basis for FTO designations, effectively concede. *See* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPS. ON TERRORISM (Apr. 28, 2006), *available at* http://www.state.gov/s/ct/rls/crt/2005/65275.htm (failing to cite any violent or terrorist actions taken by the group after 2001 and acknowledging that "MEK terrorism in Iran declined toward the end of 2001"). Despite the MEK's renunciation of violence, as well as repeated urgings by members of Congress to revisit the issue,[9] the Secretary has

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[9] *See, e.g.*, *Reviewing the State Department's Annual Report on Terrorism: Hearing Before the House Subcomm. on Int'l Terrorism and Nonproliferation of the House Comm. on Int'l Relations*, 109th Cong. 30-31 (2006) (noting that the MEK has not engaged in any terrorism for several years and "urg[ing] the State Department to provide a road map to those organizations on the terrorist list that would like to get off, particularly those . . . that do not threaten Americans, and in particular . . . the MEK") (statement of Rep. Brad Sherman, Member, House Comm. on Int'l Relations); U.S. Congress, Iran Statement (Nov. 2002) (expressing concern that "the holdover designation will cause unnecessary harm and will undermine the efforts of those legitimately working to establish democracy in Iran") (signed by 150 members of the

refused to revoke the designation. By contrast, other groups have been removed from the FTO list after refraining from violence for far shorter periods of time. *See, e.g.*, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGANIZATIONS, DESIGNATIONS BY THE SEC'Y OF STATE (Oct. 8, 1999), *available at* http://www.state.gov/s/ct/rls/rpt/fto/2682.htm (removing the Manuel Rodriguez Patriotic Front Dissidents and the Democratic Front for the Liberation of Palestine from FTO list "primarily because of the absence of terrorist activity, as defined by relevant law, by those groups during the past two years").

Instead, the same political considerations that drove the MEK's original designation as an FTO – *i.e.*, a desire to improve its relationship with the Iranian regime – appear to be responsible for the Secretary's failure to revoke the designation. Thus, for example, when asked in 2000 why the NCRI was added to the list of MEK aliases, a senior State Department official explained, "[t]he Iranian government had brought this to our attention." Robert Dreyfuss, *Colin Powell's List: The Targeting of "Terrorist" Groups Harks*

House of Representatives); U.S. Congress, Policy Statement on Iran (Aug. 2001) (urging the U.S. to support the democratic goals of the NCRI) (signed by 32 members of the U.S. Senate); U.S. Congress, Statement on Iranian Policy (June 2000) (reaffirming commitment to ideas expressed in 1998 and 1999 congressional statements) (signed by 228 members of the House of Representatives); Letter from Gary L. Ackerman, Member, House of Reps., & Ileana Ros-Lehtinen, Member, House of Reps., to Madeleine Albright, Sec'y of State (May 7, 1999) (reaffirming commitment to 1998 "Statement on Iran's Deeds"); U.S. Congress, Statement on Iran's Deeds (Sept. 1998) ("This designation is indeed a wrong-headed approach, and appears to directly contradict at least the spirit of the anti-terrorism law, and *we believe the decision [to designate the MEK] should be reviewed immediately.*") (signed by 220 members of the House of Representatives) (emphasis added).

Back to Earlier Repression of Dissent, THE NATION, Mar. 25, 2002, at 16.

4. Selective designations like the one at issue here can have widespread ramifications. Allowing the executive branch to selectively designate legitimate political opposition groups as foreign terrorist organizations strips individuals of their constitutionally protected right to support disfavored political groups. Indeed, taken to the extreme, the statute would allow the executive branch to effectively proscribe the right to donate to *any* opposition or resistance group that has *ever* engaged in activities falling within Section 1182(a)(3)(B)'s scope, even if the group at issue has subsequently renounced violence. In the debate over AEDPA, members of Congress warned of precisely this possibility, noting that the designation process would "arbitrarily limit donations to entities which have completely altered their purposes and functions – such as the African National Committee [sic] – since the terrorist designation could apply to any foreign organization which has at any time in the past engaged in 'terrorist' activity." H.R. Rep. No. 104-383, at 179 (1996) ("Dissenting Views").

For many immigrant Americans and asylees living in the U.S., the impact of selective designations can be particularly harsh insofar as the causes advanced by political opposition groups abroad are often part and parcel of their most strongly held political beliefs. "When Iranians see their largest resistance group being rejected by the U.S., they are demoralized," says one Iranian-American who supports the MEK. Nick Timiraos, *Iranian Americans Rally for a Different Approach*, L.A. TIMES, Jan. 20, 2006, at A13. Particularly with respect to immigrant communities, the statute also appears to be exerting precisely the kind of chilling effect that concerned Congress prior to the passage of AEDPA. In October 2001, for example, four Iranian-American brothers were detained under a related USA PATRIOT Act provision that renders membership in the MEK a deportable crime. Robert Collier, *Exonerated in*

Terror Cases, 4 Brothers Still Locked Up, S.F. CHRON., Jan. 25, 2005, at A1. As press accounts relate, their "chief offense appears to be that they once attended a rally in support of the . . . MEK." *Id.* The brothers were eventually exonerated and released, but only after spending nearly three-and-a-half years in prison. Anne-Marie O'Connor et al., *L.A. Is a Den of Iranian Intrigue and Ambition*, L.A. TIMES, Mar. 20, 2005, at A1.

III. The MEK Is a Legitimate Political Organization Whose Supporters Should Not Be Prosecuted.

1. As the petition for certiorari illustrates, Pet. for Cert., No. 06-241, *Rahmani v. United States* 6-7, the MEK is a legitimate political resistance movement that seeks a transition from the current theocratic regime to a secular democracy. The group also supports the Middle East peace process and endorses a free-market economy in Iran. NCRI Platform, *reprinted in* WASH. POST, Oct. 9, 2002. The MEK strongly supports equal rights for women, who constitute thirty percent of its members and who hold a disproportionate number of the group's leadership positions. *See* Georgetown Univ. & Iran Pol'y Comm., *Mujahidin-e Khalq Organization (MEK), at* www.ict.org.il/inter_ter/orgdet.cfm?orgid=24.

To achieve its goals, the MEK engages in political lobbying, education, counterintelligence, and charitable activities. The group is thus credited, for example, with bringing to light Iran's covert nuclear program in August 2002. Najmeh Bozorgmehr et al., *Iran Alleged to Have Obtained N-Bomb Plans*, FINANCIAL TIMES, Nov. 18, 2004, at 7. None of the MEK's current activities could be construed as terrorist activity, even under the exceptionally broad rubric of Section 1182(a)(3)(B). As the petition also notes, the U.S. government itself has corroborated this fact during its investigation of the MEK in Iraq, which found no basis on which to charge MEK members with violations of U.S. law. Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian*

Opposition "Terror" Group Being Held in Iraq, N.Y. TIMES, Jul. 27, 2004, at A8.[10]

2. In recognition of the legitimacy of the group's goals and activities, members of Congress have consistently endorsed the MEK and have strongly objected to its listing as a FTO. On at least five separate occasions since the MEK's designation in 1997, bipartisan groups from both Houses of Congress signed statements acknowledging the MEK's role as a genuine political resistance movement and voicing their strong disagreement with the Secretary of State's designation.[11] The 1998 statement, for example, specifically emphasized that "[i]t was not Congress' intent . . . that a legitimate opposition to the Iranian regime be included within that particular list of terrorist groups." U.S. Congress, Statement on Iran's Deeds (Sept. 1998) (signed by 220 members of the House of Representatives). Legislators in other countries have similarly expressed support for the MEK: earlier this year, 430 members of U.K. Parliament and peers (as well as 2000 U.K. lawyers) signed declarations asking the British government to reconsider its designation of the MEK as a terrorist organization. Parliamentary News, PRESS ASS'N NEWSFILE, Feb. 1, 2006.

* * * *

In enacting the material support provision, Congress sought to cut off contributions in the United States to genuine terrorist organizations – a right unquestionably excluded from First Amendment protection. In so doing, Congress expressly intended that the process used to designate terrorist

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[10] Moreover, MEK members who were present in Iraq after the U.S. invasion were "granted . . . 'protected persons' status under the Fourth Geneva Convention in July 2004, treating them as noncombatants remaining in the aftermath of war." *See* Georgetown Univ. & Iran Pol'y Comm., *Mujahidin-e Khalq Organization (MEK)*, *available at* www.ict.org.il/inter_ter/orgdet.cfm?orgid=24.

[11] *See supra* note 9.

organizations subject to the material support provision would be viewpoint neutral, relying strictly on the statutory criteria. As this brief shows, however, the designation process has proven to be subject to precisely the manipulations that so concerned Congress prior to AEDPA's enactment, resulting in the improper designation of legitimate political organizations such as the MEK. For this reason, as the petition for certiorari demonstrates, it is essential that individual defendants, such as petitioners, charged with a criminal violation of the material support provisions have the right to challenge that designation.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, it is essential, for the material support provision to pass First Amendment muster, that individual defendants have an opportunity to demonstrate that the organization they have been charged with supporting was improperly designated as an FTO. Certiorari should thus be granted.

Respectfully submitted,

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ROYA RAHMANI, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The Constitution Project respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

The Constitution Project is an independent public policy organization that promotes and defends constitutional safeguards. The Project creates bipartisan coalitions of respected political and other leaders who issue consensus recommendations for policy reforms. After September 11, 2001, the Project created its Liberty and Security Initiative, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties even as we work to enhance our Nation's security. The Initiative develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights.

In July 2003, the Initiative released a *Report on First Amendment Issues*. The report urges that in formulating anti-terrorism measures, the federal government should continue to promote openness, robust political dialogue, and freedom of association. The Liberty and Security Initiative is currently examining the civil liberties problems that result from prosecutions of people for providing "material support" to terrorists. In addition, the Project's Courts Initiative conducts public education on the importance of an independent judiciary and cautions against legislation or

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, had made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. And their letters of consent have been filed with the clerk.

executive branch practices that would limit the substantive jurisdiction of courts.

STATEMENT OF FACTS

Petitioners are United States citizens and political asylum grantees from Iran. Long before September 11, 2001 and the last few years of attention on the Iranian regime, they solicited monetary donations to an Iranian opposition group dedicated to ousting Iran's ruling Ayatollahs, the People's Mujahedin Organization of Iran (PMOI).[2] The PMOI had been designated as a foreign terrorist organization by the Secretary of State in a truncated administrative proceeding from which Petitioners were excluded and which was later held to be constitutionally deficient by the United States Court of Appeals for the District of Columbia Circuit. Petitioners were indicted in March 2001 for providing material assistance to a designated organization under a federal statute that prohibited them from challenging the validity of the designation. Petitioners were precluded from an opportunity to prove that the PMOI was a bona fide political non-terrorist organization, which would have made their donations protected by the First Amendment. After various proceedings, including a request for en banc review, the indictments were sustained by a panel of the United States Court of Appeals for the Ninth Circuit.

The line between legitimate political activity and support for resistance groups that might be characterized as employing illegitimate tactics is often blurry. That blurriness--coupled with the sweeping scope of the designation criteria and the diverse foreign policy sympathies of Americans--requires exacting procedural

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[2] The PMOI is also referred to as MEK and National Council of Resistance of Iran (NCRI) in court and other legal proceedings.

safeguards to avoid criminalizing a wide swath of legitimate foreign policy speech or association.

The procedures for challenging the State Department's designation of foreign terrorist organizations are woefully deficient, as exemplified by the PMOI's designation. Indeed, they were held constitutionally flawed by the U.S. Court of Appeals for the District of Columbia Circuit. Even with some defects cured by that ruling, judicial review remains perfunctory. No designation has ever been successfully challenged.

The Ninth Circuit sustained the constitutionality of punishing Petitioners with no less than 10 years in prison for donating money to the PMOI. Their donations were made during periods when the PMOI's designations were procedurally infirm. According to the panel, however, the constitutional deficiencies could be cured retroactively for purposes of criminally prosecuting PMOI's donors.

The Ninth Circuit's ruling empowers the government to cut First Amendment corners under the banner of fighting foreign terrorism. It clashes with this Court's prior restraint decisions and invites government to suppress bona fide political speech or association to suit its foreign policy or national security maneuvering, for example, to placate authoritarian regimes by designating groups that oppose them as "terrorist." Accordingly, Judge Alex Kozinski, joined by four colleagues, forcefully dissented from the denial of en banc review of the panel's decision.

1. Congress has authorized the Secretary of State to designate a foreign group as a terrorist organization. The designation immediately makes it a crime to provide donations or other material support or resources to the designated group. 18 U.S.C. § 2339B (2000). Thus, once a designation is made, associating in a non-trivial way with the

designated group (e.g., providing expert assistance or advice) is punishable as a felony.

The designation process is denuded of customary procedural safeguards to insure accurate distinctions between constitutionally protected political activity and constitutionally unprotected terrorism. 8 U.S.C. § 1189. A designated organization is denied both notice and an opportunity to be heard. The Secretary may rely upon undisclosed classified information, hearsay, newspaper articles, CNN, Al Jazeera or any other source in making a designation.

2. The PMOI was first designated by the Secretary as a foreign terrorist organization in 1997 in what was admitted by the then administration as an olive branch to what it hoped was a more moderate Iranian regime at the time. Petitioners had no right to challenge the constitutionality of the designation. The PMOI, however, sought review of its designation in the United States Court of Appeals for the District of Columbia Circuit in PMOI v. United States Department of State (PMOI I), 182 F.3d 17 (D.C. Cir. 1999) The D.C. Circuit concluded that the Secretary's designation was neither arbitrary, nor capricious, nor an abuse of discretion, nor did it lack support in the administrative record taken as a whole or in classified information submitted in camera. The designation thus passed muster under the narrow statutory standards for review which are akin to those applied under the Administrative Procedure Act. Speaking for the Court, Judge Randolph, acknowledged that the designation might be concocted (id. at 23):

> For all we know, the designation may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from

> saying. That we cannot pronounce on the question does not mean that the Secretary was right. It means we cannot make any assumption, one way or the other.

The court also concluded that the PMOI lacked any constitutional rights because it lacked a United States presence. Id. at 22. It noted that the highly abnormal and skewed administrative proceedings and record favoring the government made judicial review of designations largely pro forma:

> But unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary's internal deliberations. When the Secretary announces the designation, through publication in the Federal Register, the organization's bank accounts in the United States become subject to seizure and anyone who knowingly contributes financial support to the named entity becomes subject to criminal prosecution. Any classified information on which the Secretary relied in bringing about these consequences may continue to remain secret, except from certain members of Congress and this court. There is provision for 'judicial review' confined to the material the Secretary assembled before publishing the designation. (citations omitted). Id. at 18.

The Court emphasized, however, that the constitutional rights of would-be donors like Petitioners might be distinguishable from the rights of the designated organizations (id. at 22, n.6): "Because the issue is not before us, we do not decide whether section 1189 deprives those in the United States of some constitutional right if they are members of, or wish to donate money to, an organization designated by the Secretary."

3. The Secretary redesignated the PMOI as a foreign terrorist organization in 1999. The designation included the National Council of Resistance of Iran (NCRI) as a PMOI "alias." The NCRI had a United States presence. The PMOI/NCRI sought review in the D.C. Circuit in NCRI v. Department of State, 251 F.3d 192 (D.C. Cir. 2001) ("PMOI II"). The court entertained and sustained a constitutional due process challenge to the one-sided designation procedures.

It held that notice must be given by the Secretary to entities scheduled for designation; non-classified information bearing on the designation decision must be disclosed; the entities slated for designation must be given an opportunity to respond, at least in writing; but classified information may be denied them. Id. at 197.

4. The Secretary reaffirmed the 1999 designation in late 2001 using the upgraded procedural safeguards required by PMOI II. The designation was applied retroactively to 1999, even though the first constitutionally valid listing of the PMOI came approximately two years later. The PMOI again appealed, and the Court of Appeals for the District of Columbia Circuit again sustained the Secretary, including the retroactive 1999 designation. People's Mojahedin Organization of Iran v. Department of State ("PMOI III"), 327 F.3d 1238 (D.C. Cir. 2003).

5. On March 13, 2001, Petitioners were indicted in the Central District of California for allegedly providing financial support to the PMOI from October 8, 1997 through February 27, 2001, for example, by soliciting donations at Los Angeles International Airport. Pet. App. 37a. Petitioners were precluded from defending on the ground that the PMOI had been incorrectly listed as a foreign terrorist organization, which, if true, would make its donations constitutionally protected speech or association. 8 U.S.C. § 1189(a)(8)(2000).

6. The District Court dismissed the indictments on the theory that the designations of the PMOI that served as the predicates of the criminal prosecutions were constitutionally infirm, Pet. App. 36a, but a unanimous panel of the United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 15a.

7. The panel denied that the retroactive designation by the Secretary violated due process. It further concluded that the First Amendment did not guarantee Petitioners an opportunity to prove that the PMOI was a legitimate, non-terrorist organization as a defense. Speaking for the court, Judge Kleinfield reasoned that the PMOI's designation by the Secretary subject to very limited judicial review at the behest of the designated entity was binding on the Petitioners regarding their First Amendment claims of a right to donate. The court denied the applicability of this Court's prior restraint doctrines announced in Freedman v. Maryland, 380 U.S. 51 (1965) and McKinney v. Alabama, 424 U.S. 669 (1976) by maintaining, that the government designations of foreign terrorist organizations must be accepted as correct in criminal prosecutions. In other words, there was no need to litigate the First Amendment's protection of the Petitioners' donations because the government had previously found to the contrary in a procedurally slanted administrative proceeding involving another party. The panel insisted that jury trials would be untenable in litigation implicating national security or foreign policy because the Executive is uniquely enlightened in that universe:

> Defendants could be right about the [PMOI]. But that is not for us, or for a jury in defendants' case, to say. The sometimes subtle analysis of a foreign organization's political program to determine whether it is indeed a terrorist threat to the United States is particularly within the expertise of the State Department and the Executive Branch. Juries could not make reliable determinations

> without extensive foreign policy education and the disclosure of classified materials. Nor is it appropriate for a jury in a criminal case to make foreign policy decisions for the United States. Pet. App. 34a.

8. Judge Kozinski, joined by Judges Pregerson, Reinhardt, Thomas and Paez, dissented from a denial of a petition for a rehearing en banc. Judge Kozinski persuasively demonstrated that Petitioners' donations would be protected First Amendment activity if the PMOI's designation was erroneous; and, that the administrative designation process was tantamount to a prior restraint on free speech by conclusively determining before a donation is given to a designated foreign organization that it would fall outside constitutional protection. The opinion further explained that the prior restraint lacked the procedural safeguards mandated by Freedman to avoid suppressing free speech. Finally, it demonstrated that treating the PMOI as the alter ego for Petitioners in challenging the correctness of its designation in the D.C. Circuit and thus foreclosing Petitioners from re-litigating the issue in a criminal prosecution violates the rule of McKinney that criminal defendants enjoy individual rights to establish that their questioned speech or activities were protected by the First Amendment. Judge Kozinski concluded:

> I can understand the panel's reticence to interfere with matters of national security, but the entire purpose of the terrorist designation process is to determine whether an organization poses a threat to national security. Under the Constitution, the State Department does not have carte blanche to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it. Far too much political activity could be suppressed under such a regime. Pet. App. 14a

ARGUMENT

The Ninth Circuit's ill-reasoned decision issued in a post-9/11 world corroborates Justice Oliver Wendell Holmes' dissent in Northern Securities Company v. United States, 193 U.S. 197, 401 (1904):

> Great cases like hard cases make bad law. For great cases are called great, not by their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

No decision of this Court upholds what the Ninth Circuit has ratified: namely, denying criminal defendants their first and only opportunity to defend the legality of their speech or association by demonstrating its First Amendment protection before they are prosecuted and possibly jailed. The closest analogy in support of the Ninth Circuit is Yakus v. United States, 321 U.S. 414 (1944), issued in the midst of World War II in which a defendant prosecuted for violating a maximum price regulation issued by the Office of Price Administration (OPA) was barred from questioning the constitutionality of the regulation as applied to its commercial sales. But Yakus underscored that the defendant himself, unlike Petitioners, had previously enjoyed a fair opportunity to make that challenge both before the OPA and in the United States Emergency Court of Appeals. Further, Yakus implicated only economic and not free speech interests.

The Ninth Circuit's ruling directly contradicts the rationale of both Freedman and McKinney, and the clear

thrust of Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). If left undisturbed, to borrow from Justice Robert Jackson in Korematsu v. United States, 319 U.S. 432, 243 (1943) (concurring opinion), the precedent will lie around like a loaded weapon ready to be employed to suppress free speech under a counter-terrorism flag. For example, it could be used to sustain a government listing of books or websites that will be conclusively held to constitute criminal incitements or material assistance to foreign terrorists and to impose criminal penalties on any person who distributes or financially supports the listed speech. Moreover, the Ninth Circuit's decision could have a substantial chilling effect. Americans would no longer be free to express their diverse views on U.S. foreign policy for fear of criminal prosecution. A case that threatens to plant the seeds of future constitutional mischief deserves review by this Court.

Contrary to the Ninth Circuit, jury determinations of the validity of designations would not compromise intelligence sources or methods. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III (2001) protects against that evil, and has been successfully invoked in numerous terrorist prosecutions, for example, the 1993 World Trade Center bombing cases. Neither would jury determinations usurp the foreign policy of the Executive Branch, no more so than do prosecutions under the Espionage Act (18 U.S.C. § 783(e)) or the Neutrality Act (18 U.S.C. § 960), both of which require jury assessments of national security or foreign policy questions in deciding on guilt or innocence.

No civilized nation has an interest in suppressing political speech or association for the sake of suppression. Where, as here, the criminal law punishes in a blurry terrain between legitimate political activity and terrorism, the most scrupulous procedural safeguards are required to avert

trampling on First Amendment speech or association. The Ninth Circuit's decision mocks that understanding.

I. THE NINTH CIRCUIT'S DENIAL TO CRIMINAL DEFENDANTS OF THE OPPORTUNITY TO DEFEND THEIR ALLEGED MISCONDUCT AS PROTECTED SPEECH OR ASSOCIATION UNDER THE FIRST AMENDMENT IS UNPRECEDENTED AND CONFLICTS WITH WELL ESTABLISHED PRIOR RESTRAINT DOCTRINES.

Unlike the Ninth Circuit's ruling in this case, this Court has never sustained a criminal prosecution against a defendant who has been denied any current or past opportunity to challenge the constitutionality of the administrative rule or action that serves as the predicate of the indictment.[3] Where First Amendment rights are in play, this Court ruled opposite of the Ninth Circuit in McKinney. This Court's decision in Yakus, although it is not a free speech case, highlights the unprecedented nature of the Ninth Circuit's harsh decree. It threatens to suppress a treasure trove of diverse foreign policy expression that has been an American hallmark.

In Yakus, the Office of Price Administration issued a regulation setting maximum prices at wholesale of specified cuts of beef and veal. The defendant had been afforded sixty days to protest before the OPA, with an opportunity to

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[3] Even Nazis accused of membership in a criminal organization by the Nuremberg Tribunal enjoyed more due process protection than have Petitioners. The Tribunal's charter authorized the declaration of a group or organization as "criminal" in connection with the trial of an individual member. But any member of an organization that the prosecution sought to have declared criminal enjoyed an opportunity to apply to the Tribunal to be heard on the issue, which it could accept or reject. If an organization was declared criminal, that finding was conclusive in prosecuting its members for membership in a criminal organization. Chapter II, Sections 9-10 of the Tribunals' Charter.

present documentary evidence, affidavits, and briefs, and with the possibility of oral argument. The OPA was required to inform any protestant of the grounds for its decision. Judicial review was available in the Emergency Court of Appeals, where additional evidence could be submitted by the protestant. The court had power to review all questions of law, including the question whether the OPA's determination was supported by evidence, and any question of the denial of due process or any procedural error that had been appropriately raised in the course of the proceedings. The OPA was not permitted to rely on secret evidence.

In these circumstances, the Court declared that the defendant could be foreclosed from belatedly challenging the constitutionality of the maximum price regulation in a criminal prosecution. The Court elaborated: "No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court." Yakus, 321 U.S. at 437.

In contrast to Yakus, Petitioners in this case have never had an opportunity to challenge the correctness of the PMOI's designation, which serves as the predicate of their indictments. They were never given notice or an opportunity to present evidence in the Secretary's process. Moreover, the reliability of the Secretary's designation is highly suspect because the procedures, including the use of secret information and anonymous sources, invite error. "The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and corrupt to play the role of informer undetected and uncorrected." United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950), (Hand, J., Dissenting opinion). The Ninth Circuit failed to cite a single case by either this Court or any inferior court that has ever

upheld a criminal prosecution in which a defendant was foreclosed from presenting a First Amendment defense which he had had no previous opportunity to litigate.

Moreover, the Ninth Circuit's decision clashes head on with McKinney. There Alabama denied a defendant charged with selling obscene material an opportunity to disprove its alleged obscenity. The material, however, had been declared obscene in a prior civil judicial proceeding to which the defendant was not a party. This Court, speaking though Chief Justice Rehnquist, declared that the First Amendment required that the criminal defendant be given the opportunity to contest the obscenity characterization:

> It is undisputed that petitioner received no notice of the Mobile Circuit Court equity proceeding, and that he therefore had no opportunity to be heard therein regarding the adjudication of the obscenity vel non of New Directions...There is nothing in the opinion of the Supreme Court of Alabama indicating that petitioner had available to him any judicial avenue for initiating a challenge to the Mobile declaration as to the obscenity of New Directions. Decrees resulting from in rem proceedings initiated under Chapter 64A of the Alabama Code could in some cases therefore have the same effect as would the ex parte determination of a state censorship authority which unilaterally found material offensive and proscribed its distribution. Such a procedure, without any provision for subsequent re-examination of the determination of the censor, would clearly be constitutionally infirm. McKinney, 424 U.S. at 674.

Petitioners' case is more compelling than that of the defendants in McKinney because they seek to protect legitimate political speech or activity of a higher First Amendment order. As the Court held in Young v. American Mini Theatres, 427 U.S. 50, 71 (1976), adult materials like

those in McKinney are of marginal First Amendment importance, whereas the political activities at issue here are at its core. Moreover, the government's designation of the PMOI as a foreign terrorist organization in a truncated administrative proceeding rather than a judicial proceeding featuring customary procedural protections was held by the Ninth Circuit to be conclusive in a criminal prosecution on the question of whether Petitioners' donations were legitimate political contributions. Yet Petitioners enjoyed no opportunity to participate in the designation proceedings. The PMOI was not their alter ego. Further, the court pointed out in PMOI I that judicial review of a designation at the behest of a designated organization is perfunctory. Additionally, the PMOI may have been handicapped in litigating. The time for appeal was short. It may have lacked the resources to litigate effectively. It may have cared less about the designation than Petitioners either because the PMOI was not confronting a criminal prosecution or because their assets or support base in the United States were not great enough to justify a maximum litigating effort.

Finally, the designation process authorized by Congress is indistinguishable from the putative state censorship authority condemned by the Court in McKinney. The Secretary makes virtual ex parte determinations that designated organizations are not genuine political organizations engaged in protected First Amendment activity and proscribes American citizens from making donations with no provision for subsequent re-examination at the behest of indicted donors.[4] The statute's reach is sweeping, and terrorism is defined to include any threat to use an explosive device or firearm (or, as amended, any "weapon or dangerous device" such as a knife or blunt instrument see 8

[4] The only findings of the Secretary subject to judicial review are whether the designated organizations are "foreign" and that they "engage[ ]in terrorist activity." PMOI I, 182 F.3d 17, 22 (D.C. Cir. 1999).

U.S.C. § 1182(3)(B)(iii)) to damage property anywhere in the planet, unless for personal monetary gain. Pet. App. 72A. As the D.C. Circuit found in PMOI I, judicial review of the Secretary's designation decisions is more ceremonial than substantive:

> We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging. PMOI I, 182 F.2d at 25, (D.C. Cir. 1999).

Under the rationale of the Ninth Circuit, Congress could enact a law empowering the Secretary to prepare an Index of Forbidden Books and Websites that conclusively determined that the materials on the Index constituted criminal incitements to violence not free speech (an often blurry distinction)[5] for purposes of criminal prosecutions against distributors. Such a statute is precisely what McKinney declared would be constitutionally infirm in the context of distributing obscenity, which hangs on the lowest rung of the First Amendment.

The Ninth Circuit seemed to distinguish McKinney from Petitioners' case by insisting that juries are ill-equipped to second-guess foreign policy determinations of the Executive Branch. It further insisted that a jury trial over the

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[5] NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

correctness of a designation would require the disclosure of classified information. Those distinctions do not wash. CIPA has operated for years to enable criminal trials implicating national security issues to proceed while protecting classified information. Then head of the Justice Department's Criminal Division, Michael Chertoff, testified before the Senate Judiciary Committee to that effect.[6] Prosecutions under the Neutrality Act, *supra,* require the jury to determine, *inter alia,* what is a military expedition or enterprise and whether a nation is at peace with the United States. Espionage Act prosecutions under 18 U.S.C. § 793(e), require juries to determine what is "national defense information," and whether its publication can be used "to the injury of the United States or to the advantage of any foreign nation." Further, even a jury finding against the Secretary's designation in a criminal case would not substantially frustrate the foreign policy of the United States. The finding would not create an estoppel against the government in other proceedings involving different parties. United States v. Mendoza, 464 U.S. 154 (1984).

Also undermining the Ninth Circuit's analysis is the fact that an errant designation defense is already available in civil injunction actions to enjoin donations to a designated organization. Pet. App. 61a. Finally, under the Ninth Circuit's reasoning, Congress could deny defendants in section 1189 prosecutions the right to dispute whether their assistance to a designated organization was "material" within the meaning of the statute on the theory that only the Executive Branch holds the expertise to distinguish between what is trivial and what is significant for a particular designated foreign terrorist organization. But this Court has insisted that neither war nor national security is a blank

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[6]DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, United States Senate Committee on the Judiciary, November 29, 2001 available at http://judiciary.senate.gov/print_testimony.cfm?id=126&wit_id=66

check for the Executive Branch. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

The contemporary fear of international terrorism, spiked by the 9/11 abominations, has provoked a political reaction comparable to the post-World War II alarms over Communism, which degenerated into McCarthyism. In PMOI I, the D.C. Circuit found a similarity between the Secretary's process for listing designated foreign terrorist organizations and the Attorney General's process for listing communist organizations which this Court found legally deficient in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). PMOI I, 182 F.3d at 22 (D.C. Cir. 1999). This Court properly blunted efforts by Congress or the Executive to shortchange the First Amendment or other fundamental constitutional rights in the name of fighting international communism.[7] It should similarly serve as ballast between national security and the First Amendment in a post-9/11 world.

II. THE HIGHLY PREJUDICIAL PROCEDURES EMPLOYED BY THE SECRETARY TO JUSTIFY DESIGNATING GROUPS AS FOREIGN TERRORIST ORGANIZATIONS AS OPPOSED TO LEGITIMATE POLITICAL ASSOCIATIONS FAILS THE FIRST AMENDMENT DEMAND FOR EXACTING PROCEDURAL SAFEGUARDS WHEN THE LINE BETWEEN CONSTITUTIONALLY PROTECTED AND UNPROTECTED SPEECH OR ASSOCIATION IS BLURRY.

Where, as with the PMOI, the line between support for legitimate political opposition, which is protected by the

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[7]See e.g., Yates v. United States, 355 U.S. 66 (1957); Watkins v. United States, 354 U.S. 178 (1957); Scales v. United States, 367 U.S. 203 (1961); Apthecker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967).

First Amendment, and support for terrorism, which is not, is agonizingly elusive, the procedures for drawing that line must be far more demanding than section 1189's charade sustained by the Ninth Circuit. That proposition is even more emphatic when the line drawing forms the predicate of a criminal prosecution for donating to support allegedly unprotected activity.

This Court's decision in Freedman dictates that courts, not administrative agencies, must be entrusted with drawing the line between free speech and unprotected support for terrorism, at least when government swings with the heavy hand of a criminal prosecution. As Freedman explained, agencies driven by political incentives are insufficiently sensitive to First Amendment values. 380 U.S. at 58. That concern is heightened in section 1189 designations because the Secretary's mission is to advance the foreign policy agenda of the United States and the political agenda of the President. Those agendas might tempt her to designate groups opposed to repressive regimes (of which there are many) as a negotiating tactic to win a concession coveted by the United States, for example, a renunciation of nuclear ambitions or an increased supply of oil; or, to designate for the sake of designation to create a desired political appearance of "tough on terrorism." The latter type of incentive may have been at work in the United States' mistaken identification of Syrian Canadian Mahar Arar as a terrorist and his deportation to Syria, where he was tortured.[8] In other words, there is a high risk of error in the Secretary's designations that stem from foreign policy or domestic political objectives.

The adverse free speech consequences are major. The definition of foreign terrorist organization enables the

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[8]*See* Ian Austen, "Canadians Fault U.S. for Its Role in Torture Case," N.Y. Times, Sept. 19, 2006.

Secretary to designate any group that she finds is "foreign" and has engaged in "terrorist activity," the latter term reaching the threat to use a firearm or explosive (and, as amended, even a knife or blunt instrument) anywhere on the planet to damage property other than for personal gain. Moreover, the Secretary's national security determination is not subject to judicial review. Under that broad definition, the Secretary can designate virtually any foreign resistance group as terrorist, and thus criminalize the contributions or other material support American citizens would give to advance its legitimate political objectives. The potential impact on free speech is troublesome. United States citizens feature a rich array of backgrounds and foreign policy views. That has always been a source of pride. Yet under section 1189, this wonderfully diverse collection of free speech (which is often unavailable in the home countries of the speakers) can be suppressed at the whim of the Secretary, either as a foreign policy tactic or to make the Administration appear unrelenting in opposing terrorism.

The suppression problem is compounded by the proverbial "chilling effect" engendered by the opaque meaning of "material" assistance. It arguably includes any type of expression or advice that might boost the morale or negotiating skills of a designated organization. Citizens will choose silence over any expression near the line of material assistance to avoid the prospect of an FBI inquiry, a grand jury investigation, or an indictment, which would cause them great expense and psychological trauma.

Contrary to the Ninth Circuit, judicial review of national security or foreign policy determinations of the Secretary would not be problematic. Courts review the correctness of classification decisions of the Executive Branch under the Freedom of Information Act. 5 U.S.C. § 552(a)(1). They do the same in reviewing the Executive Branch's pre-publication vetting of books authored by former employees,

Alfred Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1975), and in determining whether to enjoin the publication of classified information or restricted data under the Atomic Energy Act obtained by the press, New York Times v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring opinion); United States v. The Progressive Inc., 486 F. Supp. 5 (W.D.Wis. 1979). Indeed, Congress itself in enacting 8 U.S.C. § 1189 chose to permit courts to review the national security findings of the Secretary regarding designated organizations in civil injunction actions brought by the government to enjoin donations. In other words, to conclude that the First Amendment requires that donors to a designated organization be offered an opportunity to pursue de novo review in an Article III court to dispute the accuracy of the designation would be neither novel nor unworkable. And it is pivotal to protecting a rich universe of time-honored freedom of expression.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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